# Montana's one-call law: Damage prevention in the federal context

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## Quick Q&A

**Q. Why is there concern that Montana's one-call law doesn't comply with federal regulations?**
**A.** With passage of the Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006 (PIPES), the federal government was authorized to establish a process for potentially taking enforcement action over pipeline incidents in states that have laws that are lacking. Federal officials have indicated that because Montana's one-call law has no enforcement authority, it doesn't measure up to federal standards.

**Q. What does, "no enforcement authority" mean?**
**A.** In Montana, if an excavator damages an underground facility, it is up to the facility owner to collect a penalty and turn that damage fee over to the appropriate one-call center. While the law requires incidents to be reported to one-call centers, only a handful of facility owners in Montana have historically reported incidents. Utilities failing to report an underground facility's location to the one-call center face no penalties -- even if an excavator incurs damage after accidently striking a facility that wasn't marked.

**Q. If it is determined that Montana's one-call law doesn't comply with federal regulations what are the consequences?**
**A.** The Pipeline Hazardous Materials Safety Administration (PHMSA) is provided with some "backstop" authority to potentially conduct civil enforcement against one-call violators, under certain conditions. This means excavators who violate one-call regulations in Montana and damage pipelines could face federal fines as opposed to fines established in Montana law.

While fines in Montana currently range from no more than $125 for the first incident to no more than $1,000 for the third and subsequent incidents, federal civil penalties for damage to hazardous liquid or gas pipelines range from $50,000 to $1 million. Because of numerous high-profile pipeline violations, Congress also is contemplating legislation that may increase the maximum penalty for pipeline damage to $2.5 million.

Potential federal enforcement is not contemplated for other types of underground facilities. This raises the question of whether Montana's damage prevention law should be altered only to address federal requirements for pipeline safety, as mandated under the PIPES Act of 2006, or whether the law should be changed and new requirements should apply equally to all underground facilities. Stakeholders and lawmakers alike may wish to examine this issue in-depth in contemplating any new enforcement authority.



Energy & Telecommunications Committee M
September 16, 2011

Exhibit 5

## Introduction

The effectiveness of Montana's underground facility damage prevention program, captured in Title 69, Chapter 4, part 5, Montana Code Annotated, is the subject of review by the Energy and Telecommunications Interim Committee of the Legislature (ETIC). And as pressure from the federal government to seek reform builds, ETIC members agreed to dedicate a portion of their time during the 2011-12 interim to a one-call discussion. ETIC members indicated they would like background information to better understand how Montana's one-call law works and aspects of the law that may be inadequate. The ETIC has requested one-call stakeholders provide the committee with draft legislation or a written report of findings and recommendations concerning Montana's one-call law in January 2012. A letter from ETIC Chairman Alan Olson was sent to stakeholders in July. That letter is attached in **Appendix A**.

Federal officials are urging states to strengthen their one-call programs, paying particular attention to natural gas and hazardous liquid pipelines. With passage of the Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006 (PIPES), the federal government was authorized to establish a process for potentially taking enforcement action in states that have laws that are lacking. Federal officials have indicated that Montana law is lacking and have provided the state with feedback on the improvements needed to make Montana's law more effective. Although the PIPES Act is for natural gas and hazardous liquids, other underground utility owners have become involved in discussions about updating one-call laws. Stakeholders have discussed the potential of only changing Montana's one-call law to address enforcement for pipelines -- as opposed to changing the entire one-call law. For example, a change in the current law to create an enforcement program for liquid and natural gas pipelines that would not include other underground utilities has been discussed. "There are other states that have a separate enforcement process for events involving only pipeline facilities. Although we believe in consistent enforcement that holds ALL accountable, out authority is limited to events involving pipelines and we certainly understand that states must often compromise on this issue," according to the federal Department of Transportation.[1]

In 2008, with the help of a grant, the PSC accelerated work with stakeholders, including utilities, contractors, and law enforcement, and regulators to discuss problems with Montana's statute and potential changes. Those stakeholders continued to meet in 2009 and 2010 with the goal of developing a consensus on changes to the law to present to the Montana Legislature in 2011. While the group reached many areas of agreement, the stakeholders did not reach a consensus on a bill draft to bring before the Legislature.

The 2011 Legislature, however, discussed one-call reform when contemplating House Bill No. 503. The bill would have established an underground utility safety board to enforce Montana's one-call laws. The bill was opposed by rural electric cooperatives, contractors, independent telecommunications systems, county governments, the building industry association and the

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[1]Email correspondence with U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration, August 19, 2011.

Montana Farm Bureau. The bill was supported by NorthWestern Energy, Qwest, the Public Service Commission, the Montana Utility Coordinating Council, and the Montana Telecommunications Association. The bill was tabled by the House Federal Relations Energy and Telecommunications Interim Committee.

## Background

Pipeline releases and leaks have been a hot-button topic in Montana in the last year. Releases can be the result of excavation, mechanical failure, operator error, and corrosion. In addition, natural forces, like frost, flooding, and earthquakes can damage underground facilities. Pipes can have damage including hairline cracks, pinhole leaks, and corrosion. Most catastrophic failures are the result of unexpected and sudden stress that acts on an existing weak point in a pipe, like a hairline crack or even a simple bend. However, it should be noted, "third-party excavation damage is the single greatest cause of accidents among natural gas distribution pipelines." [2] The focus of the ETIC's review is on third-party excavation damage. It does not include a discussion of overall pipeline safety, and it is not solely focused on pipelines.

In the wake of the July 1, 2011 oil spill into the Yellowstone River -- believed to be the result of a pipeline rupture caused by flooding -- Governor Brian Schweitzer created an Oil Pipeline Safety Review Council. That council consists of the directors of the Department of Environmental Quality, the Department of Natural Resources and Conservation, and the Department of Transportation. The council is advising the Governor on the status of all existing oil pipelines running underneath Montana's rivers and streams. The council is charged with making recommendations to prevent future pipeline failures.

This ETIC review is centered on minimum standards for Montana's one-call notification program to ensure damage prevention of underground facilities and to meet federal requirements.

## Stakeholders

There are a multitude of stakeholders, ranging from local governments and contractors to rural telecommunications companies to international oil giants. In an oversimplification of stakeholders, there are two broad categories outlined in Montana law: excavators and underground facility owners.

An excavator is an operation that moves, or otherwise displaces earth, rock, or other material in the ground using tools, equipment, or explosives. The term includes but is not limited to grading, trenching, digging, ditching, drilling, augering, tunneling, scraping, and cable or pipe plowing and driving. It does NOT include surface road grading maintenance or road or ditch maintenance that does not change the original road or ditch grade or flow line.

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[2] "Pipeline Safety and Security: Federal Programs", CRS Report for Congress, Paul Parfomak, October 2008, page 13.

An underground facility is a facility buried or placed below ground for use in connection with the storage or conveyance of water, sewage, electronic, telephonic or telegraphic communications, cablevision, fiber optics, electrical energy, oil, gas, or other substances. The term includes but is not limited to pipes, sewers, conduits, cables, valves, lines, wires, manholes, and attachments to the listed items. It does NOT include shallow underground water systems designed to irrigate lawns, gardens, or other landscaping.

The federal government establishes minimum pipeline safety standards.[3] The U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration (PHMSA) houses the Office of Pipeline Safety and has overall regulatory responsibility for hazardous liquid and gas pipelines under its jurisdiction. The PIPES Act of 2006, the Pipeline Safety Improvement Act of 2002, the 1968 Natural Gas Pipeline Safety Act, and the 1979 Hazardous Liquids Pipeline Safety Act outline the duties and powers of the Office of Pipeline Safety.

In Montana, the federal government inspects, regulates, and enforces interstate pipeline safety requirements -- those are pipelines that cross state boundaries. The federal government also inspects, regulates and enforces intrastate liquid pipeline safety requirements -- those include crude and petroleum product lines. The state of Montana regulates, inspects, and enforces intrastate gas pipeline safety requirements. In Montana, this is a task assigned to the Gas Pipeline Safety Division of the Montana Public Service Commission (PSC). The PSC inspects both natural gas distribution and transmission lines.

There also is a Montana Utilities Coordinating Council (MUCC) that is not the official damage prevention lead recognized in state law, but represents the majority of Montana's one-call stakeholders and underground facility owners. The MUCC represents the one-call stakeholders in 54 of Montana's counties. The Flathead Valley Utility Coordinating Council represents those entities with buried facilities in Flathead and Lincoln counties. The two councils have not seen a need to coordinate on issues in the past, however, they do have shared members including NorthWestern Energy and Glacier Electric Cooperative.

One-call centers are required by federal law, and individual states have damage-prevention laws that outline how excavators and underground utility owners and operators utilize the center to promote public safety. There are not uniform federal requirements or other federal regulations covering how one-call centers need to operate.[4] States have enacted a variety of damage prevention laws that establish notification centers and establish procedures for stakeholders. The laws vary greatly from state to state.

Montana's one-call law, Title 69, chapter 4, part 5, establishes the responsibilities of excavators and underground facility owners and establishes damage fees. The damage fees were enacted by

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[3] U.S. Code of Federal Regulations (CFR), Title 49 "Transportation", Parts 190 - 199.

[4] Transportation Equity Act of 1998 (PL 105-178, June 9, 1998, 112 Statute 107)

the Montana Legislature in 2005 (SB 326). The one-call law also underwent a revision in 1997 (HB 375). In 1997 requirements that facility owners file information with the county clerk and recorder were eliminated, primarily because the information was not being filed. Companies would instead file information with a one-call center, and the law was amended to reflect that. In 1997 time requirements for locates were clarified, and provisions for emergency excavations were also established.

## One-call requirements

In Montana, a public utility, municipal corporation, underground facility owner, or person having the right to bury underground facilities **must** be a member of a one-call notification center covering the service area in which the entity or person has underground facilities. This does NOT apply to an owner or occupant of real property where underground facilities are buried if the facilities are used solely to furnish services or commodities to that property and no part of the facility is located in a public street, alley, or right-of-way dedicated to the public use.

There are two one-call notification centers serving Montana. The MUCC is part of the Utilities Underground Location Center (UULC). The UULC contracts with One Call Concepts in Oregon. This center serves 54 of Montana's 56 counties. UDIG also known as the Montana One Call Center is the one-call notification service that represents Flathead and Lincoln counties and portions of Lake and Sanders counties. By calling 811, excavators reach the appropriate call center.

Excavators must contact a one-call notification center and locate underground lines before beginning an excavation. All owners of underground utilities have two-days to respond to a request to locate their underground facilities.

If an underground facility is damaged by an excavator who fails to use the one-call center, the excavator is liable to the owner of the underground facility for the actual cost of the repair of the facility. An additional "damage fee" is imposed. For the first incident the fee can't exceed $125. The second incident carries a fee of no more than $500 and no more than $1,000 for additional incidents. The owner of the facility collects the fee and distributes it to the one-call center.

In 2010, three entities (NorthWestern Energy, Montana Dakota Utilities, and Energy West) collected about $12,494 in damage fees, according to data collected by MUCC. To-date in 2011, about $5,065 has been collected. The fees are used for public education and outreach -- like the "call before you dig" advertisements. The fees are to be given to the MUCC or FVUCC. But again, there are no safeguards in place to ensure the councils are receiving all the fees they are due for damages. Each member identifies, invoices, and collects a fee on their own. There also is much difficulty in tracking down how much in fees is collected, because there is no central accounting of what is being billed or collected. No such accounting is required in Montana law.

The MUCC notes that it struggles to track the number of actual incidents. Very few facility owners in Montana provide damage records, despite the fact that the law requires the owners of

underground facilities to report incidents. Prior to February 2010, there is little, if any data. Some companies collect and maintain their own damage data and have agreed to share that information with the MUCC. The council reports that NorthWestern Energy, Montana Dakota Utilities, and Nemont Telephone have provided reports. MUCC goes on to note, "This is not to say that other members would not or are not providing data. It may simply be they just have nothing to report."

**Table 1**

| Cities with the most damage | | | | |
|---|---|---|---|---|
| **City** | **Number of reports[5]** | **Percentage of reported damage** | **Repair costs** | **Percentage of repair costs** |
| Billings | 73 | 29.3% | $40,218.33 | 19.6% |
| Missoula | 24 | 9.6% | $25,208.44 | 12.3% |
| Helena | 23 | 9.2% | $15,655.52 | 7.6% |
| Kalispell | 17 | 6.8% | $13,247.44 | 6.5% |
| Butte | 7 | 2.8% | $5,776.6 | 2.8% |
| Bozeman | 5 | 2% | $3,823.16 | 1.9% |
| Total for 6 cities | 149 | 59.8% | $103,929.49 | 50.8% |
| All other areas | 100 | 40.2% | $100,793.63 | 49.2% |

** Information compiled by Clint Kalfell, Montana811*

There is only a penalty for damage that is reported. There are incidents where a facility is damaged, but there isn't a "reportable incident". Those incidents are not always recorded, and no fee is collected. MUCC is pursuing options, like a web-based reporting system discussed later in this report, to encourage more reporting by members. A 2010 damage study found that 52% of the incidents were cases where a locate had not been requested.[6]

Repair costs for the 249 damage reports received was $204,723. MUCC provided the damage information it has in **Table 1**. Additional analysis of homeowner versus contractor damage is included in **Table 2**. As noted in the examples above, Montana's one-call law has no enforcement authority. It is up to a utility owner to collect the penalty and turn that damage fee over to the

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[5]Study includes reports received as of February 7, 2011. Only 5 companies provided useable information. The cause of an incident also was not included in information provided.

[6]Information provided by Clint Kalfell, Montana 811, August, 2011.

one-call center. Utilities that fail to report an underground facility's location to the one-call center face no penalties -- even if an excavator incurs damage after accidently striking a facility that wasn't marked.

**Table 2**

| Damage by contractor or homeowner | | | | | | | |
|---|---|---|---|---|---|---|---|
| | **Number of reports** | **Percent of damage** | **Repair cost** | **Percent of repair cost** | **Had Locates** | **Did not have locates** | **% of no locates** |
| Contractor | 159 | 63.9% | $142,618.69 | 69.7% | 101 | 58 | 36.5% |
| Homeowner | 90 | 36.1% | $62,104.43 | 30.3% | 20 | 70 | 77.8% |

** Information compiled by Clint Kalfell, Montana811*

## Federal review

The Pipeline and Hazardous Materials Safety Administration (PHMSA) is developing new federal rules to encourage states to strengthen their one-call laws. The Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006 authorized PHMSA to develop the new rules and to take action if it is determined that a state's enforcement of pipeline safety regulations is inadequate.[7] The 2006 Act did NOT provide new federal resources for PHMSA to take over enforcement across the nation. The act provided some "backstop" authority to conduct civil enforcement against one-call violators who damage pipelines, under certain conditions. PHMSA must develop rules and establish procedures for declaring a state's enforcement to be inadequate. Those rules are expected later this fall.

Federal regulators have indicated Montana's current one-call law fails to meet PHMSA standards, particularly in the areas of enforcement. As noted repeatedly above, there is no enforcement authority in Montana.

The 2006 Act cited nine elements of effective damage prevention in an effort to assist stakeholders in determining the effectiveness of state programs. Montana is one of eight states that fails to address enforcement in both areas. In the in-depth review of the federal criteria, the majority of the remarks tie back to there being no enforcement authority defined in Montana law and no actual enforcement. Below is a rating, compiled by the federal Department of Transportation based on interviews with Montana's one-call representatives, of where Montana rates on the nine elements:

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[7]http://www.gpo.gov/fdsys/pkg/PLAW-109publ468/pdf/PLAW-109publ468.pdf

**Table 3**

| Montana Damage Prevention Program | | |
|---|---|---|
| 1. | Enhanced Communications Between Operators and Excavators | Partially implemented. Marginally effective. Actions planned for improvement. |
| 2. | Fostering Support and Partnership of all Stakeholders | Fully implemented. Effective. |
| 3. | Operator's Use of Performance Measures for Locators | Fully implemented. Effective. |
| 4. | Partnership in Employee Training | Partially implemented. Marginally effective. Actions planned for improvement. |
| 5. | Partnership in Public Education | Fully implemented. Effective. |
| 6. | Enforcement Agencies' Role to Help Resolve Issues | Not implemented. Needs to be addressed. |
| 7. | Fair and Consistent Enforcement of the Law | Not implemented. Needs to be addressed. |
| 8. | Use of Technology to Improve the Locating Process | Partially implemented. Marginally effective. Actions planned for improvement. |
| 9. | Data Analysis to Continually Improve Program Effectiveness | Partially implemented. Marginally effective. Actions planned for improvement. |

*Source: PHMSA Pipeline Safety Program. Results of State Damage Prevention Program Characterizations*

Below are the comments provided showing where Montana's law fails to meet the intent of the 2006 federal act (language italicized). The information was compiled in November 2009 and is largely based on the 54 counties represented by the MUCC.[8] The Flathead Valley Utility Coordinating Council reports that the PHMSA analysis does not include information from Flathead or Lincoln counties.

**①Enhanced Communications Between Operators and Excavators**

*"Participation by operators, excavators, and other stakeholders in the development and implementation of methods for establishing and maintaining effective communications between stakeholders from receipt of an excavation notification until successful completion of the excavation, as appropriate."*

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[8] PHMSA, Results of State Damage Prevention Program Characterizations, Herb Wilhite, U.S. Department of Transportation, November 6, 2009.

The analysis notes the following areas where Montana's law or implementation fall short:

- Montana law requires a minimum of two working days, but does not address criteria that the call be made no more than 10 working days prior to beginning excavation.

- By calling 811, an excavator gets the Utilities Underground Location Center (UULC) call center in Washington or Oregon or UDIG, the one-call notification service the represents Flathead and Lincoln counties. Excavators must belong to both if they work in both areas.

- Montana law does not require that an excavator who makes a facility locate request receive a positive "response". (Positive response can include markings, documentation at the job site, phone call, fax, email. It lets an excavator know that ALL facility owners have marked requested areas.) In Montana each operator handles a "response" differently. The law only requires marking within two working days.

- While the UULC and UDIG have written processes and define roles and responsibilities, Montana, itself, does not. The Montana Utilities Coordinating Council (MUCC), which also has written processes, is not the official damage prevention lead recognized by state law. (Flathead Valley Coordinating Council also is not recognized.)

- There is no formal process to support and encourage feedback from stakeholders on how communications should be improved.

- Because there is no enforcement mechanism, there are limited opportunities to encourage underground facility owners to respond to locate requests promptly or accurately.

- Road name discrepancies identified by a locator are not updated online.

- An excavator is not required to notify a facility owner directly or through the one-call center if a facility is not found where it was marked, or if an unmarked facility is found.

- An excavator who discovers damage to an underground facility owner is not required to notify the one-call center or the facility owner. Because there is no enforcement, damage also may not be reported. While "incident histories" are to be maintained, there is no enforcement.

- An excavator responsible for damage that results in the escape of flammable or toxic gas or liquid is not required to call 911. Utilities have been known to notify 911, after receiving a call from an excavator.

**②Comprehensive Stakeholder Support**

*"A process for fostering and ensuring the support and partnership of stakeholders, including excavators, operators, locators, designers, and local government in all phases of the program."*

The analysis notes the following areas where Montana's law or implementation fall short:

- Irrigation and landscaping operations are exempt. Because there is no enforcement, one gas gathering system operator also is not a member. The operator is installing un-locatable lines in Montana.

- The MUCC is not recognized in law, and some members believe the relationship with the UULC is "strained".

**③Operator Internal Performance Measurement**

*"A process for reviewing the adequacy of a pipeline operator's internal performance measures regarding persons performing locating services and quality assurance programs."*

- The analysis did not note Montana compliance problems.

**④Effective Employee Training**

*"Participation by operators, excavators, and other stakeholders in the development and implementation of effective employee training programs to ensure that operators, the one call center, the enforcing agency, and the excavators have partnered to design and implement training for the employees of operators, excavators, and locators."*

The analysis notes the following areas where Montana's law or implementation fall short:

- Employee programs aren't tailored to data trends relative to performance, complaints, or damages because there is no tracking or trending for damages in Montana.

- Training records for individuals aren't maintained, other than via sign up sheets at meetings.

**⑤Public Education**

*"A process for fostering and ensuring active participation by all stakeholders in public education for damage prevention activities."*

The analysis notes the following areas where Montana's law or implementation fall short:

- While at least three stakeholder groups take part in education and awareness programs, there is no "single" entity that promotes comprehensive programs to educate all stakeholders.

- Money that Montana entities give to the UULC is not necessarily spent on programs in Montana.

**⑥Dispute Resolution**

*"A process for resolving disputes that defines the state authority's role as a partner and facilitator to resolve issues."*

The analysis notes the following areas where Montana's law or implementation fall short:

- There is no state authority designated as having a clearly defined role in resolving/mediating damage disputes.
- There is not due process for resolving disputes related to damage prevention issues.
- There is no state authority operating under transparent rules.
- There is not a balanced committee of stakeholders to handle dispute resolution.

**⑦Enforcement**

*"Enforcement of state damage prevention laws and regulations for all aspects of the damage prevention process, including public education, and the use of civil penalties for violations assessable by the appropriate state authority."*

The analysis notes the following areas where Montana's law or implementation fall short:

- State law fails to define a damage prevention enforcement authority.
- There is not a defined process for receiving reports of violations from stakeholders.
- Because there is no violation process, that process is not transparent.
- Because there is no enforcement, annual statistics about incidents, investigations, enforcement actions, proposed penalties, and collected penalties are not available.
- There is no "reasonable" enforcement. A "reasonable" process should not impose unnecessarily high costs on any participant and should not shield any class of violators from the consequences of a violation.
- Penalties are tiered in law, but there is no compliance program.
- Stakeholders aren't involved in a periodic review of enforcement activities.
- Because there is no enforcement, it can't be determined if enforcement actions are timely.
- There is not adequate investigation to determine the root cause of damage or the responsible party, because there is no enforcement authority.
- There is no determination of whether state laws and regulations on location were followed because there is no law for enforcement.
- There is not a structured review process to impartially adjudicate violations.

**⑧Technology**

*"A process for fostering and promoting the use, by all appropriate stakeholders, of improving technologies that may enhance communications, underground pipeline locating capability, and gathering and analyzing information about the accuracy and effectiveness of locating programs."*

The analysis notes the following areas where Montana's law or implementation fall short:

- There isn't a statewide damage tracking tool, so new technology isn't being implemented or tailored to meet needs.

**⑨Damage Prevention Program Review**

*"A process for review and analysis of the effectiveness of each program element, including a means for implementing improvements identified by such program reviews."*

The analysis notes the following areas where Montana's law or implementation fall short:

- While MUCC evaluates damage reported to them and uses the information to improve, there is no enforcement or compliance to ensure that the MUCC is being told of all the damages.

- Results of damage reports are not quantified against a standardized risk factor.

- Montana law requires incident reports to be public, but with no enforcement, damage or incident reports are not recorded.

## Other states

In late 2009 and early 2010 PHMSA reviewed damage prevention programs in each state. The review was done by conducting interviews with state pipeline safety office officials and one-call center representatives. The state representatives were invited to describe their statewide programs and how they correspond with the nine requirements of the PIPES Act of 2006.

PHMSA notes that many representatives were candid in their discussions about potential problems in existing state laws, while others may not have provided the most complete picture. "Thus, the results should not be construed to be a conclusive reflection of the status of the damage prevention program for any state." The results of the state damage prevention program characterization initiative are included in **Appendix B**. PHMSA states that the results are intended to promote discussions within states about strengthening one-call programs.[9] Eight states (Arizona, Georgia, Louisiana, Maine, Minnesota, New Hampshire, Vermont, and Virginia) were the only states rated as having implemented all nine elements of the federal recommendations.

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[9]http://primis.phmsa.dot.gov/comm/sdppcdiscussion.htm?nocache=5083

Minnesota: Gold Star

Gopher State One Call, a nonprofit organization, is often held up as being a model for underground utility damage prevention programs. The program was developed following a serious pipeline accident in the Twin Cities in 1986. Government leaders responded by creating a Minnesota Commission on Pipeline Safety to recommend improvements to the existing one-call laws. The 1987 Minnesota Legislature responded by developing a centralized, statewide information processing center that relays excavation information to excavators and underground facility operators.

The Minnesota One-Call Excavation Notification System is codified in Minnesota Statute, chapter 216D. Gopher State One Call was separately incorporated by the Minnesota damage prevention industry. It is managed by a volunteer board of directors. The Minnesota Department of Public Safety -- Office of Pipeline Safety enforces the laws related to the excavation notification system. Gopher State One Call is funded by the 1,400 underground facility members who are members. It does not receive money from the Minnesota Legislature. In 2009, Gopher State One Call reported a budget of about $5 million.

Under Minnesota law "Underground facility" means an underground line, facility, system, and its appurtenances used to produce, store, convey, transmit, or distribute communications, data, electricity, power, heat, gas, oil, petroleum products, water including storm water, steam, sewage, and other similar substances.

In establishing operating procedures and technology for the statewide notification center, a board of directors also works with the league of Minnesota cities, the association of Minnesota counties, and the township officers' association to maximize the participation of local governmental units that issue permits for activities involving excavation to assure that excavators receive notice of and comply with state requirements. The Minnesota Office of Pipeline Safety, Gopher State One Call, and utility coordinating councils provide annual excavation damage prevention seminars. The agency reports that excavation related damages in Minnesota have declined by more than 70 percent since 1994.[10]

A number of excavators and utility owners in Minnesota, and other states, track damage-related information through a system called Data Information Reporting Tool (DIRT). The program was launched by the Common Ground Alliance, which grew out of a U.S. Department of Transportation study completed in 1999. The "Common Ground" best practices is referred to in Title 49, Chapter 61 of the United States Code. It identifies best practices for reducing damage to underground facilities. The Common Ground Alliance is governed by a 20-member board of directors.

Using DIRT, states report information to the Common Ground Alliance. The data, however, is voluntarily reported. But with PHMSA and the Common Ground Alliance's focus on data

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[10]https://dps.mn.gov/divisions/ops/Pages/training.aspx

collection, voluntary reports are increasing. In 2008, 63 percent of estimated damages were submitted to DIRT.[11] Montana stakeholders report that they have sought financial support from PHMSA to better utilize the DIRT program.

Washington and Nevada: Legislative changes

The PHMSA analysis showed Washington state, like Montana, did not have an adequate enforcement mechanism in state law. Enforcement is often viewed as the key to dealing with noncompliance and improving damage prevention programs. However, enforcement can be seen as a big step. There are arguments about increasing the size of government, naming an enforcement agency, and overall impact to stakeholders.

In 2009, the Washington State Utilities and Transportation Commission formed a "Dig Law Group" that was a group of stakeholders charged with working together on a solution. In May 2011, House Bill No. 1634 was passed and approved. The "Underground Utilities Damage Prevention Act of 2011" was the result of three years of stakeholder input, two substitute bills and substantive amendments. Because the bill substantially changes the state's one-call laws, it will not take effect until January 2013, allowing stakeholders and state agencies to adapt to the new procedures. Highlights of HB 1634 include:

- Failure by an underground facility operator to subscribe to a one-call service constitutes a willful intent to avoid compliance with underground utilities damage prevention laws.
- Damage to underground utilities must be reported to the Utilities and Transportation Commission (UTC) for evaluation.
- Establishes a Damage Prevention Account for the UTC to be used to educate excavators and operators.
- Creates a 13-member Safety Committee of stakeholder representatives to advise on underground utility safety and to review complaints of alleged underground utility violations.
- Establishes enforcement procedures for the UTC to address violations for UTC regulated entities or facilities and for the Attorney General to address violations by non-UTC regulated entities.[12]

In Washington, excavators face civil penalties of no more than $10,000 for each incident that involves a hazardous liquid or gas facility or a fine of not more than $1,000 for an initial violation involving another underground utility and not more than $5,000 for subsequent

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[11]http://www.commongroundalliance.com/Template.cfm?Section=DIRT_Overview&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=39&ContentID=2206

[12]http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1634

violations. [13]

Nevada provides a case study in examining the enforcement issue in phases. The Pipeline Safety Program of the Public Utilities Commission Nevada (PUCN) met with various stakeholders over a number of years to see how best to improve Nevada's one-call program. The first phase was a complaint driven process. Rather than PUCN staff acting as a police officer and issuing citations, staff responded to complaints brought by those affected.

In 2003, the PUCN looked at revising state statutes (Chapter 455 of the Nevada Revised Statutes, NRS 455) to establish administrative proceedings to deal with complaints. Those regulations took effect in 2004. The change did not result in a significant reduction in incidents. However, in looking again at the enforcement issue, stakeholders identified the following "hot buttons":

- Excavators felt the existing law was skewed to their disadvantage. They wanted a level playing field and did not want utility operators acting as judge and jury when it came to damage.
- All stakeholders were concerned about penalties being assessed by a third party and whether or not they would be fair and level.
- Some utility operators were happy with the existing system and preferred the latitude the law provided.[14]

A group called the Nevada Regional Common Ground Alliance started to discuss the enforcement issue in 2006. The Nevada Public Utilities Commission worked closely with the alliance, which developed into an advisory group with statutorily defined functions. In 2007 the stakeholders brought forward legislation (Senate Bill No. 396) that granted the PUCN staff direct enforcement. In June 2007 the bill became law. The law itself does not establish enforcement criteria; the PUCN staff was not granted explicit authority to directly issue citations. Rather, complaints were submitted to the Nevada Public Utilities Commission.

PUCN staff performed random one-call inspections on what was termed a "go-slow" approach. The approach allowed PUCN staff time to adjust to the new role and time for enforcement criteria and protocols to be developed. By the fall of 2007, stakeholders began discussing potential enforcement criteria. A three-stage enforcement process and various "violation tiers" were recommended. The three phases included:

- Verbal warnings issued in the field
- Written warning letters from PUCN attorneys
- Civil penalty assessments by the Public Utilities Commission

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[13] Revised Codes of Washington, 19.122.055 and 19.122.070.

[14] "Damage Prevention Professional", Winter 2011, Ken Jones, Gas Pipeline Engineer with Public Utilities Commission of Nevada.

To begin the transition, the number of PUCN inspectors was increased from one to four. Only verbal warnings were issued. "From mid-2009 to mid-2010, the enforcement process reached maturity, with dozens of verbal warnings issued, 11 written warning letters issued, and four civil penalty cases pursued. As of late 2010, a total of 27 written warning letters have been issued (three to utility operators and 24 to excavators, including the state highway department) and 15 civil penalty cases have been pursued (four against utility operators and 11 against excavators)."[15]

The Public Utilities Commission of Nevada reports inspections increasing from none in 2006 to 400 in 2009. PUCN staff report 11 show cause proceedings and "damages to underground infrastructures are down approximately 50 percent."[16]

Indiana: Limited enforcement

The Indiana Legislature in 2009 revised its damage prevention program in response to the PIPES Act of 2006. Indiana established an "underground plant protection advisory committee" that includes seven members appointed by the governor. The membership is made up of oil and gas interests, excavators, and one-call representatives. The committee oversees penalties -- which are only applied if there is oil or gas pipeline damage. The committee, for administrative purposes, is affiliated with the Indiana Utility Regulatory Commission. Committee members are volunteers and are not compensated. The advisory committee is just beginning to take shape and has been meeting monthly.[17] It has not yet issued any penalties.

The commission's pipeline safety division is charged with investigating pipeline violations and reporting its findings to the committee. With respect to penalties, the pipeline safety division reports violations, and the committee can issue warning letters, provide education, and levy fines. Fines are restricted to only violations of the law when a pipeline or gas distribution company's lines are involved. Most fines have a maximum of $10,000 per occurrence. The money collected goes into an account to pay for training and public awareness.

Before levying a fine, a violator can appear before the committee. If the committee determines the person is a first time violator and the violation did not result in physical harm, the committee cannot recommend a fine. The committee also can reverse a violation issued by the commission's pipeline safety division.[18]

South Carolina and Tennessee: Working toward change

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[15] Ibid.

[16] Public Utilities Commission of Nevada 2011 Biennial Report, page 30.

[17] Indiana Pipeline Safety Director Bill Boyd, phone interview, August 19, 2011.

[18] Indiana Code 8-1-1 through 8-1-26.

The 2010 South Carolina Legislature contemplated legislation to update state one-call laws. After learning more about the controversial aspects of the law, lawmakers, however, changed course and directed stakeholders to go back to the table and develop consensus legislation to bring in 2011. The driver for change was the 2006 federal PIPES Act.

The result was Senate Bill No. 705. South Carolina's Underground Facility Damage Prevention Act requires all utilities to be members of a "call before you dig"service. South Carolina also addressed enforcement. Penalties for violations are divided between the Attorney General's office and the state's general fund. The money is to be used to fund enforcement of the law. Stakeholders reported that since the one-call law was originally enacted in 1978 there had not been a single enforcement action. A board of directors including 24 members also was established to represent stakeholder interests and to govern the notification center.[19] The new South Carolina law takes effect in 2012. Highlights include:

- Mandatory one-call center membership. All utilities must be members of the 811 "Call Before You Dig" service.
- Positive response. Utilities are required to respond and coordinate responses with those who give noticed before digging.
- Tolerance zones. The actual location of underground utilities must be no more than 24 inches from marks on the ground. This was reduced from 30 inches.
- Modernization. Changes were made to integrate new standards, technologies, and practices into state law.
- 811/One-Call Center governance. The membership for board seats for the state's One Call Center was increased for greater stakeholder representation.
- Enforcement. Penalties for violations are divided between the Attorney General's office and the state's General Fund. The Attorney General's office agreed to establish an enforcement mechanism if these changes were made.

The 2009 Tennessee Legislature directed the Tennessee Advisory Commission on Intergovernmental Relations to review the effectiveness of the state's underground utility damage prevention program. The study came as a result of controversial legislation introduced to the previous legislature.

The Tennessee study flagged voluntary damage reporting, a lack of civil penalties for violations, and a lack of a state-level comprehensive underground utility damage prevention program as major weaknesses in the law. Similar to Montana, responsibility for safe excavation is on the shoulders of excavators and utility owners in Tennessee. The 2011 Legislature did not pursue legislative changes.

## Conclusion

In comparing Montana's one-call law to potential federal requirements and model legislation in

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[19]South Carolina Code of Laws, 58-36-10 through 58-36-120

other states, the issue of enforcement rises to the top. Stakeholders, and lawmakers alike, will likely need to address the following issues:

- Is there a need to define a damage prevention enforcement authority?
    - Should enforcement only apply to pipelines?
    - If so, what state agency should take this responsibility?
    - How will enforcement be initially funded?
    - Should enforcement be phased in?

- Should there be a defined process for receiving reports of violations from stakeholders?
    - If so, how can stakeholders be assured it is a transparent process?
    - What mechanisms should be used to ensure statistics about incidents, investigations, enforcement action, and penalties are being kept?

- Are the penalties in Montana law adequate?
    - If not, how should they be changed?
    - Should a process for reviewing those penalties be established?
    - Should underground facility owners face penalties for failure to comply?

- What should the role of stakeholders be in Montana's one call law?
    - Should an advisory council or quasi-judicial board be established?
    - What are the duties of that board or council?
        - Reviewing disputes?
        - Reviewing enforcement activities?
    - What about terms of office, compensation, membership?
    - Can a board our council ensure there is a due process for resolving disputes related to damage prevention issues?

- What other areas of existing law need to be changed to ensure federal compliance and a fair, and transparent process?
    - Excavation to commence within 10-days?
    - Positive response defined?
    - Depth of utilities?

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Appendix A

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**Energy and Telecommunications Interim Committee**

**62nd Montana Legislature**

**SENATE MEMBERS**
ALAN OLSON--Chair
VERDELL JACKSON
JIM KEANE
CLIFF LARSEN

**HOUSE MEMBERS**
TONY BELCOURT--Vice Chair
ROBYN DRISCOLL
HARRY KLOCK
AUSTIN KNUDSEN

**COMMITTEE STAFF**
SONJA NOWAKOWSKI, Lead Staff
TODD EVERTS, Staff Attorney
DAWN FIELD, Secretary

July 29, 2011

**TO:** One-call stakeholders
**FR:** Energy and Telecommunications Interim Committee (ETIC)
**RE:** Revising Montana's one-call law

Greetings,

On behalf of the Energy and Telecommunications Interim Committee I am writing to encourage the entities who have an interest in Montana's one-call law (Title 69, chapter 4, part 5) to work together to suggest revisions to the existing law, if necessary, to ensure it complies with federal requirements.

The ETIC met in Helena on July 15 and outlined a study plan for the coming year. The ETIC, a bipartisan committee representing the Montana Senate and House of Representatives, agreed that a discussion of Montana's one-call laws is needed. At its July meeting, the ETIC learned that Montana's one-call laws have been the subject of review by stakeholders for the last few years. It is the ETIC's understanding that to-date stakeholders have not been able to reach a consensus on the best course of action to bring Montana's one-call laws into compliance.

ETIC members will discuss the need for change in Montana's current law. The committee will be provided with background reports, prepared by staff, at September and November meetings. Members also plan to invite representatives of the U.S. Department of Transportation, the Montana Public Service Commission, and Montana's One-Call Center to provide an overview of the issues. Public comment also will be accepted during those meetings.

The ETIC requests that stakeholders submit a written report to the committee by its **January 13, 2012** meeting. The committee is seeking specific solutions to bring Montana's one-call laws into compliance with federal requirements. Solutions should include potential draft legislation for the ETIC's review. If stakeholders are unable to reach a consensus, the committee requests a detailed, written account of areas where there is not agreement. The committee is relying on you, the stakeholders and entities most affected, to develop a sound solution and to ensure that Montana's one-call law is in compliance with federal requirements.

Sincerely,

ETIC Chairman Alan Olson

Appendix B

Stakeholder Communications

PHMSA Pipeline Safety Program

# Results of State Damage Prevention Program Characterizations (SDPPC)

PHMSA's SDPPC initiative evaluated state damage prevention programs against the nine elements of effective damage prevention programs that were cited by Congress in the Pipeline Inspection, Protection, Enforcement and Safety (PIPES) Act of 2006. The purpose of these evaluations was to help stakeholders gain a better understanding of the successes and challenges existing in the state damage prevention programs, where the programs may need improvement, and where PHMSA can focus further assistance. A brief summary discussion of the initiative is available.

To support this effort, PHMSA developed a program characterization tool to help ensure consistent evaluation of the state programs. Additionally, brief summaries of the state damage prevention programs were developed during the discussions with the representative stakeholders. Following are the current state damage prevention program characterization results. These may change from time to time as states take steps to strengthen their programs.

**Element Legend:**

*The Nine Elements of Effective Damage Prevention Programs include the following. Follow each link to see a map of how the elements are implemented among the states.*

Element 1 - Enhanced Communication between Operators and Excavators

Element 2 – Fostering Support and Partnership of all Stakeholders

Element 3 – Operator's Use of Performance Measures for Locators

Element 4 – Partnership in Employee Training

Element 5 – Partnership in Public Education

Element 6 – Enforcement Agencies' Role to Help Resolve Issues

Element 7 – Fair and Consistent Enforcement of the Law

Element 8 – Use of Technology to Improve the Locating Process

Element 9 – Data Analysis to Continually Improve Program Effectiveness

**Symbol Legend:**

Largely implemented program element

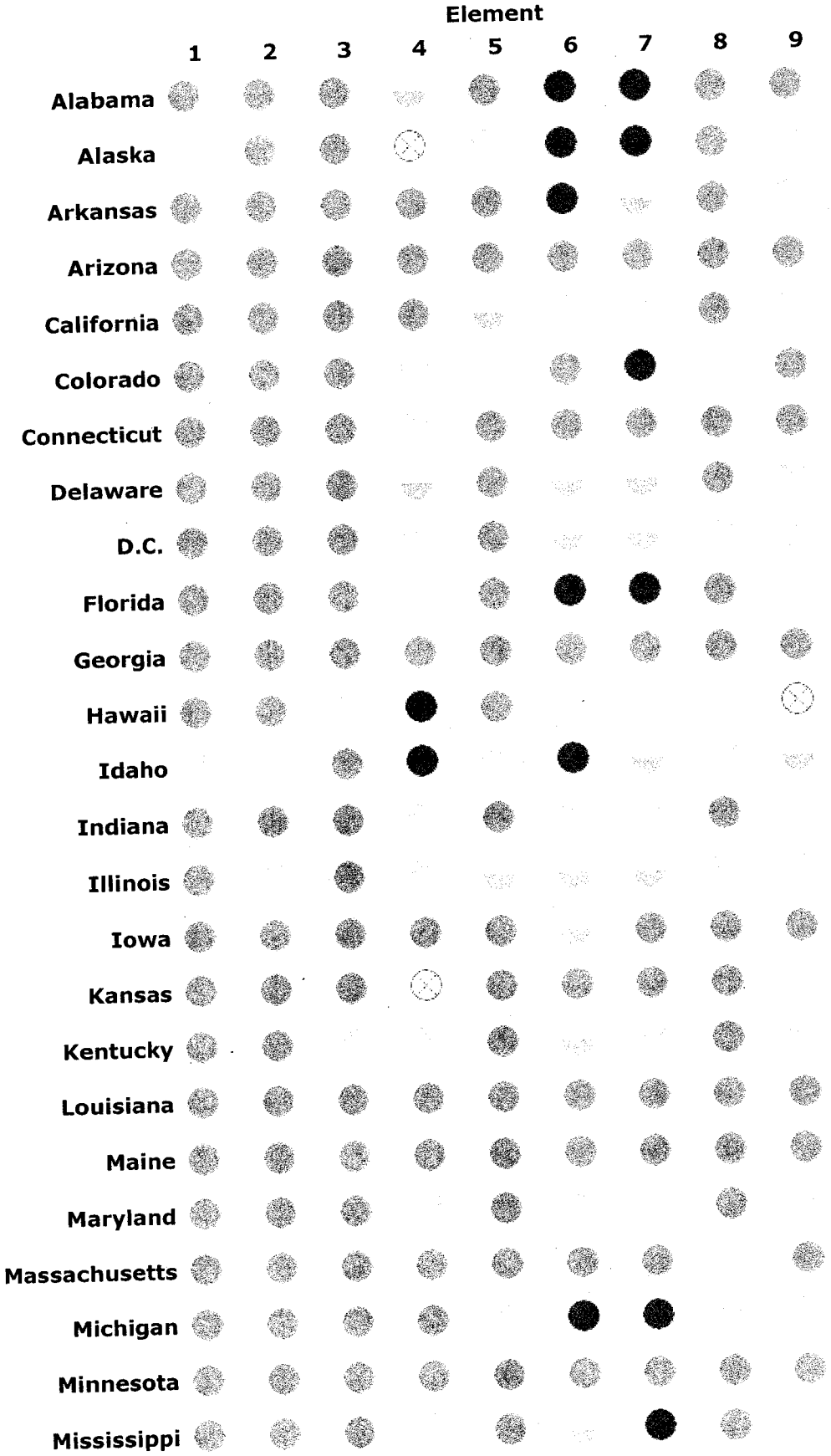
Partially implemented or not fully developed program element; actions are underway or planned for improvements

Element partially implemented/marginally effective program element needs improvement; no actions underway/planned for improvement

Program element is not implemented and needs to be addressed

No information available or not applicable

## Appendix B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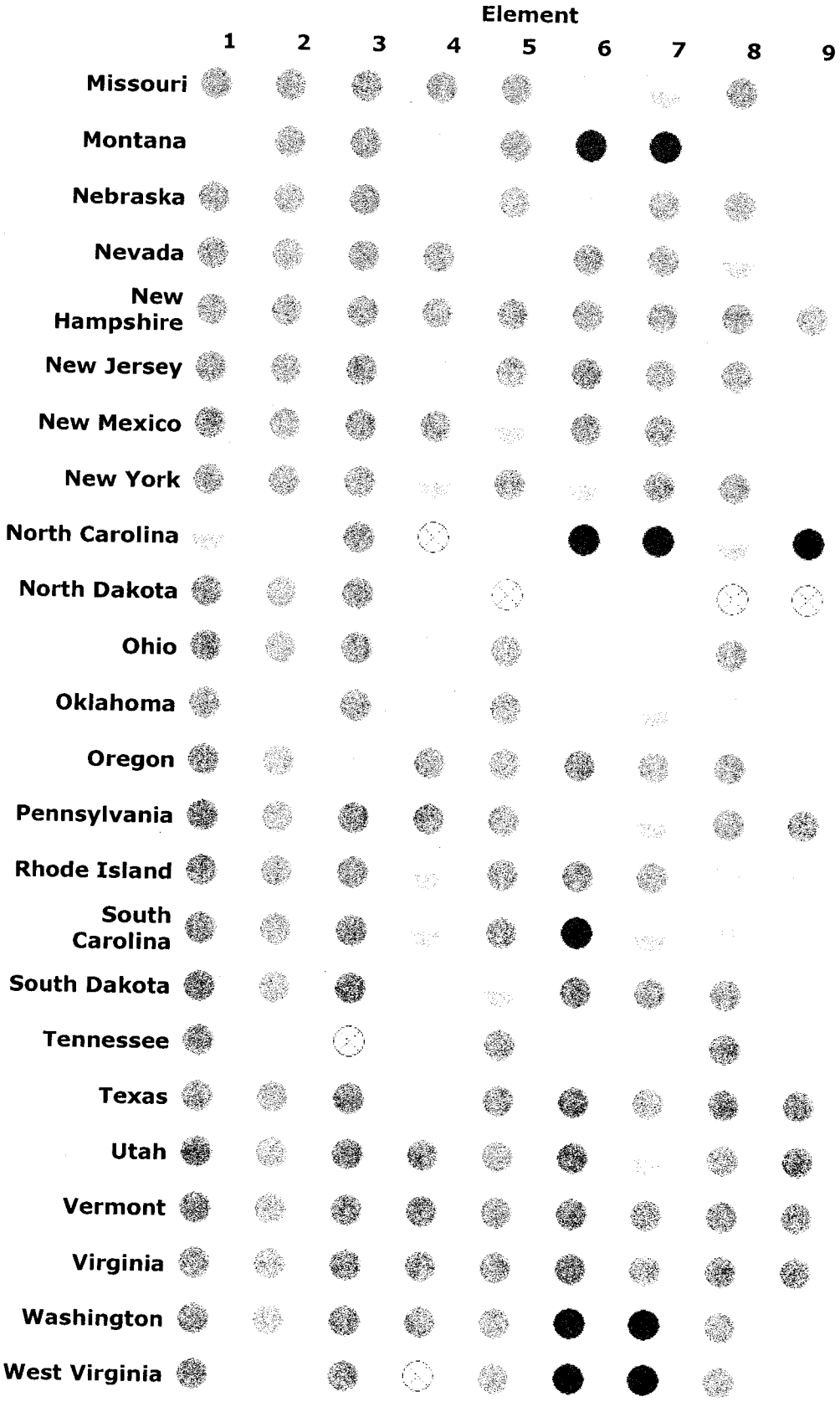
Appendix B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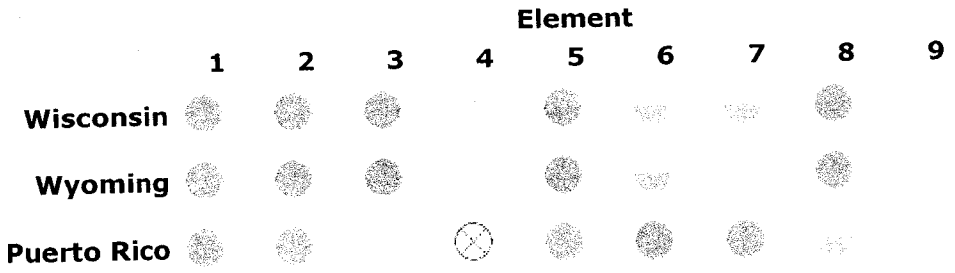
## Appendix B