

STATE OF NEW MEXICO, LINCOLN COUNTY: Recorded this 25th day of February, 2002  
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Martha W Proctor

Lincoln County Clerk

By:

Opal Hill

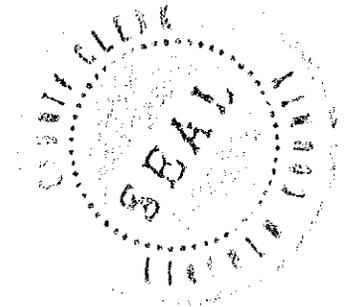
Deputy

Rec. # 200201880

Fees \$0.00

**LINCOLN COUNTY**

**NEW MEXICO**



**ROAD CUTS**

**ORDINANCE**

**2002-01**

**RIGHT-OF-WAY PERMIT AND EXCAVATION ORDINANCE**

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**ORDINANCE NO. 2002-01**

AMENDING, RECOMPILING AND RE-ENACTING ORDINANCE 2001-13, WHICH REGULATES ROAD CUTS; REQUIRING PERSONS TO GIVE NOTICE PRIOR TO EXCAVATION IN RIGHTS-OF-WAY; PROVIDING FOR EMERGENCY EXCAVATION; REQUIRING THE INSTALLATION OF CULVERTS IN COUNTY RIGHTS-OF-WAY ACCESS; SETTING FEES; AND PROVIDING PENALTIES FOR VIOLATION.

WHEREAS, the Board of County Commissioners of Lincoln County has determined that specific regulations need to be established and/or amended which regulate the installation and maintenance of utilities in County rights-of-way; and,

WHEREAS, this Ordinance is further necessary to eliminate unwarranted, undermined, or otherwise unsatisfactory excavation in County rights-of-way or boring under County roads, and to place regulation of such excavation under the jurisdiction of the County to the extent permitted by law; and,

WHEREAS, such regulations are necessary for the public safety, health, and the welfare of the citizens of Lincoln County.

NOW, THEREFORE, BE IT ORDAINED by the Board of Commissioners of Lincoln County as follows:

**Section 1. Short Title.** This Ordinance shall be referred to as the Right-of-Way Permit and Excavation Ordinance of the County of Lincoln, New Mexico.

**Section 2. Purpose.** This Ordinance is enacted to regulate road cuts and mandate the installation of culverts in public rights-of-way access; protect the integrity of the public rights-of-way; and to provide funds necessary for the management, operation and maintenance, planning and engineering, reconstruction of street cuts, and to protect the integrity of the County roadways. To achieve these purposes, it is necessary to establish permit procedures and to fix and collect fees and charges.

**Section 3. Jurisdiction.** This Ordinance shall apply to the public rights-of-way or other public places of Lincoln County, New Mexico with the exception of incorporated municipalities, unless municipalities by ordinance adopt these regulations and enter into interlocal agreements with the County for enforcement.

**Section 4. Definitions.** The following words, terms, and phrases, when used in this Ordinance, shall have meanings ascribed to them in this section, except where the context clearly requires a different meaning:

**“County right-of-way”** shall mean the total area of land deeded, reserved by plat, or otherwise acquired by Lincoln County primarily for the use of the public for the movement of people, goods and vehicles.

- (i) Where the width is not clearly demonstrated, it shall be fifty (50') feet in width.
- (ii) County rights-of-way are held by dedication or prescriptive right.

**“County Road Superintendent or his designee”** shall mean that person employed, contracted, or otherwise designated by the County for purpose of coordination, permitting and excavation activities in the County right-of-way.

**“County roadways”** shall mean the improved surface of the right-of-way used by vehicular traffic primarily for the use of the public for the movement of people, goods and vehicles.

**“Culvert”** shall mean a drain crossing under a road or embankment used to accommodate watershed.

**“Emergency”** means any situation necessitating excavation for the purpose of locating trouble or making repairs in a system for an immediate protection of life, property, or the public welfare, or to correct an interruption of utility service.

**“Excavation Project”** shall mean any plans for excavation which are adequately described in the original application for a permit or any amendment or extension thereof prior to the expiration of the permit.

**“Excavation”** means a hole, trench, ditch, depression or displacement, created on public property or public easements appearing of record or acquired by adverse possession or prescriptive use, resulting from the removal or displacement by a person of pavement, dirt or other material.

**“Excavator”** means any person digging, excavating or otherwise conducting work which requires excavation in the County right-of-way pursuant to a valid permit.

**“Permittee”** means any person required by this Ordinance to obtain a permit or give advance notice prior to excavation in a County right-of-way.

1. When a person obtaining the requisite permission is the same as that conducting the work in the County right-of-way, the terms “excavator” and “permittee” shall be considered synonymous.

2. All contracts by the County with permit holder will be made to the Permittee unless otherwise requested.

“**Person**” means any person or persons, singular or plural, male or female, natural or artificial, including, but not limited to, a firm, partnership, association, corporation, company or organization of any kind, but does not include the County or its employees.

“**Road cut**” shall mean a cut made in the ground or pavement of any County roadway or right-of-way, including excavation, backfill and paving.

“**System**” means any pipe, pipeline, tube, main, service, manhole, meter, regulator, valve, conduit, cable, or object of any kind or character whether enumerated herein or not, placed or maintained in, upon, along, across, or under any public property or public easements appearing on record or acquired by adverse possession or prescriptive use.

“**Utility**” means any person or business furnishing to the public gas, water, electricity, sewer service, telephone service, cable television, or similar service.

#### **Section 5. Excavation Projects; Permit Required.**

A. Unless otherwise provided by this Ordinance, any excavation project within County right-of-way must be permitted by the County Road Superintendent or his designee before excavation can commence. Applications for permits for installation of driveways or culverts in County rights-of-way shall be made by the property owner or his agent and the applicable fee shall be paid by applicant at the time the application is made.

B. In accordance with Section 9, application for excavation permits under County roads or in County rights-of-way shall be made at the County Road Yard in Capitan, New Mexico, at least five (5) working days prior to the date when work is scheduled to commence. Application may also be made by phone or mail, so long as payment of the application fees is made prior to the issuance of a permit. Applications by mail shall be given at the following address:

Lincoln County Road Department  
P.O. Box 666  
Capitan, New Mexico 88316  
(505) 354-2922

Permits must be issued by the County Road Superintendent, or his designee, no more than five (5) business days after receipt of an application at the above-referenced office.

Once a permit is issued, the applicable work must commence within thirty (30) days. Any extension shall be granted by the County Road Superintendent.

Permit fees will be doubled if work has commenced prior to a permit being issued.

**Section 6. Exemptions.** Exemptions from the requirement to obtain right-of-way use permits shall be as follows:

A. Activities authorized by approved construction plans. Construction activities relating to paving, grading and drainage improvements within County rights-of-way for projects that have been reviewed, approved and construction authorization granted by the Board of County Commissioners of Lincoln County shall be exempted from the requirement for obtaining right-of-way use permits. This does not include utility-related construction.

B. Routine maintenance operations. Other provisions of this ordinance notwithstanding, routine maintenance operations by public utilities franchised or otherwise regulated by Lincoln County or the State of New Mexico are exempt from the requirement to obtain a permit for such routine maintenance.

**Section 7. Advance Notice of Excavation Required.**

A. No person shall make any excavation within a County right-of-way outside the corporate limits of the municipalities located in Lincoln County, unless at least forty-eight (48) hours prior to excavation, that person has given other affected utilities, and the office of the County Road Superintendent, notice of the place, time and the type of the proposed excavation. Any legal holiday or other day when the offices and departments of Lincoln County are closed shall not count as part of the two complete business days.

B. After receiving notice of the intended excavation and within forty-eight (48) hours, prior to the time excavation is scheduled to begin, as specified by the notice, the affected utilities shall mark the location of its utility system at the place of the proposed excavation.

C. No excavation shall begin before the time excavation is scheduled to begin as specified in the above-described notice. Thereafter, the excavator may begin excavation at the time specified in his notice to utilities even though the affected utilities have not located and marked their underground utility system at the place of the proposed excavation.

D. If excavation is not commenced within forty-eight (48) hours of the time specified in the notice given to the affected utilities and the County, a person shall be required to repeat the advance notice provisions of this Ordinance. This provision does not apply where a complete plan as required under Section 6 has been submitted and approved for multiple road cuts or within a subdivision.

E. If any excavation should continue for a period in excess of seven days, then the excavator shall give, within 24 hours, notice of the continuing excavation, and shall likewise give such notice for each seven days thereafter.

**Section 8. Display.** A permit issued under this ordinance shall at all times be in the possession of a competent person actually on the job covered thereby and shall be shown upon demand to the

County Road Superintendent, Sheriff's Officer, or properly authorized officer or employee of Lincoln County.

**Section 9. Emergency Excavation.**

A. In cases of emergencies, a person may make an excavation without making application or giving forty-eight (48) hours advance notice to the affected utilities. However, prior to an emergency excavation, if the emergency excavation is discovered during working hours, the person shall make reasonable effort to give telephone notice to the County Road Superintendent or the County Manager and all affected utilities in accordance with Section 7 of this Ordinance.

B. As soon as practical after discovering an emergency, the person conducting excavation within a County right-of-way shall make necessary application, pay the application fees, and shall otherwise comply with the terms of this Ordinance.

**Section 10. Manner of Excavation.**

A. Regarding paved or chip sealed roadways or surfaces, boring under roadways shall be considered the primary manner of excavation. Road cuts will only be allowed on paved or chip sealed roadways where the individual or utility franchise provides evidence that boring places an undue burden based on geological or technical conditions. Parallel road cuts shall be made in easement rights-of-way and not in roadways unless specifically authorized by the County Road Superintendent or County Manager.

B. Utilities installed in public rights-of-way shall be placed at a minimum depth of 36 inches below the surface of the ground.

C. All paved and chip sealed roadway or surface cuts shall be made with a mechanical paving or cement cutter in order that they may be straight and uniform in nature. Proper bracing shall be maintained to prevent the collapse of adjoining ground. In excavations, the excavation shall not extend beyond the opening or cut at the surface.

D. A tracer wire shall be installed along any and all underground utilities if needed to allow for the location of said utilities. In addition, a caution tape shall be installed one foot (1') above any in-ground installation for the purpose of locating underground utilities.

E. All material excavated from road cuts shall be maintained on-site so as to not interfere with traffic control, until such time that it is reused in the backfill or hauled away.

F. Backfilling. Material which is excavated from a road cut and is noticeably wet or otherwise unsuitable for backfill, as determined by the Road Superintendent, shall be disposed of and proper backfill shall be brought in at the applicant's expense. If material has been deemed unsuitable, the Permittee shall provide a base course or other gravel type of bedding as backfill. Permittee is required to use mechanical or vibratory compaction equipment necessary to compact an eight-inch

layer of any backfill material to ninety-five percent (95%) of a modified proctor, with moisture equipments plus or minus two percent of the optimum moisture. It will be the option of the Road Superintendent to order compaction tests on any road cut backfill as he deems necessary, to ensure that there will be no future soil settlement. There will be no additional charge to the applicant for these tests unless the compaction test results reveal the compaction to be less than required under this Ordinance, at which time the Permittee may be required to pay for said testing.

**Section 11. Warning Devices.** Every person making or causing to be made any excavation shall keep the excavation barricaded at all times in accordance with the Manual on Uniform Traffic Control Devices for Streets and Highways published by the U.S. Department of Transportation, Federal Highway Administration. It shall be the responsibility of the person performing the excavation to provide safety lights, barricades and other protective devices to ensure the safety of the public. Flagmen shall be employed where necessary or proper for traffic control. Whenever practical, the amount of excavation opened by an excavator should not exceed the work completed on any given day. Should the completion of excavation and restoration thereof not be completed by the end of a working day, it shall be his responsibility to provide proper and adequate warning devices for the excavated area.

**Section 12. Requirement for Driveways and Culverts; Permit Required.**

A. **General provisions for culvert permits.** The following general provisions shall apply to all culvert permits:

(1) A culvert shall be installed in each commercial or residential access driveway intersecting with a County roadway or County right-of-way, unless said project is exempted by the County Road Superintendent.

(2) Culvert pipe must be installed prior to the commencement of residential or commercial construction.

(3) Culverts shall be of adequate design and capacity to handle the flow of water during times of high water, and to contain or move the water. The minimum size of a culvert shall be 18 inches in diameter, unless otherwise approved by the County Road Superintendent or his designee. Driveway culverts must be a minimum of 20 feet in length. Additional lengths may be required if the depth of the ditch is greater than normal.

(4) Culverts shall be new corrugated metal pipe no less than 12 gauge. No other types of culverts shall be allowed.

B. **Driveway and Culvert permits required.** A permit shall be required for installation of a driveway and/or culvert to any residential or commercial driveway and full front culvert project within County rights-of-way with open drainage systems.

(1) Requirements for driveway and culvert permits. Applicants for driveway and culvert permits shall submit a completed application signed by the property owner or his agent.

(2) The property owner shall be responsible for maintenance of the driveway or culvert for a two-year period from the date of installation.

**Section 13. Permit Fees.** The Board of County Commissioners is authorized to set reasonable fees and charges for the implementation of this Ordinance. Such fees charged will substantially finance the expenditures of reviewing projects. All revenue from permit fees will be deposited into the County's general fund. Any person doing work requiring a permit to conduct an excavation project of a system being placed on or located in County right-of-way or any person installing a culvert in any County roadway or right-of-way shall pay the appropriate fee at the time the permit is granted. Permit fees will be doubled if work has commenced prior to a permit being issued, other than in a case of an emergency as provided hereunder in Section 9. Paying double fees does not waive other penalties.

The following fees for various types of activity will be contained in the following schedule, which may be amended from time to time to reflect the reasonable actual cost of reviewing plans, regulating and inspecting excavation and construction work, utility construction notification and other related activities within County rights-of-way.

A. Any permit issued by the Lincoln County Road Department for excavation projects to install or maintain systems, including driveways and culverts, located within a County right-of-way or County roadway shall be subject to a permit fee of twenty-five dollars (\$25.00).

B. Each excavation project involving cutting a County roadway or right-of-way which has a base course, chip sealed, oil penetration, or pavement finish, excluding driveways or culverts, will be subject to a fee of twenty-five dollars (\$25.00), in addition to the permit fee.

C. For parallel trenching in a County right-of-way, the lineal foot price shall be five (\$0.05) cents per lineal foot, in addition to the \$25.00 permit fee.

D. Excavation involving a bell hole shall be subject to a fee of five (\$5.00) dollars, in addition to the twenty-five dollar (\$25.00) permit fee.

**Section 14. Restoration of Right-of-Way and Roads; Warranty Period.**

A. After any person or utility franchise makes any excavation or tunnel in or under any County roadway or other public right-of-way, that person or utility franchise shall immediately restore the surface or ground to its original condition, to include compaction, grading, keeping drainage structures clear, or as required by the Road Superintendent. The restoration of any surface shall include restoration to original thickness.

B. In the case of cutting or boring of paved or chip sealed surfaces or trenching in a County right-of-way, the Permittee will have the responsibility to maintain the repair for a period of one (1)

year, excluding reasonable wear and tear. Upon notification and within fifteen (15) days thereafter that the bore patch or other repair has settled, shifted or otherwise caused an uneven or dangerous condition in the roadway, the Permittee shall repair the road surface within fifteen (15) working days from the date the Permittee receives such notification or make such other arrangements as are mutually agreed by the parties.

C. In the event that the Lincoln County Road Superintendent becomes aware of a hazardous or otherwise dangerous condition, existing as a result of an excavation in the County right-of-way, the County Road Superintendent shall have the authority to take such steps as are necessary to remove or mitigate the hazardous condition. Such remediation will be limited to that reasonably necessary to prevent injury or harm to persons or property.

As soon as practicable, the County Road Superintendent shall attempt to contact the responsible party to advise of the action taken. To the extent the responsible person or persons cannot be ascertained, the Lincoln County Road Superintendent will have the option to proceed in accordance with the penalty provisions of Section 20 and/or seek reimbursement for the cost of the repairs, pursuant to Section 15 of this Ordinance.

#### **Section 15. Application.**

A. The permit application shall be on a form provided by the County and shall provide, at a minimum, the name of the permittee, his authorized agent or contact person, including the excavator, if applicable, the scope and duration of excavation work to be performed within the County right-of-way, the time and date on which excavation within the County right-of-way is to commence, and the name of the person (s) for whom the work is being done.

B. The application must also contain a description and depiction on a plat or other map showing the location where County right-of-way will be affected.

C. All excavation projects shall be designed and constructed in accordance with minimum standard set for that type of facility.

D. The following regulations will apply to all such work:

- ( i ) The excavator will possess the appropriate current contractor's licence if required by the State Licensing and Regulation Department for the permitted work.
- ( ii ) Two (2) sets of specification plans setting forth the nature and extent of the project within County right-of-way will be submitted with the Application. The County shall reserve the right to request more detailed specification plans of excavation within the County right-of-way, if it deems necessary.
- ( iii ) An "as built" plat of the finished excavation project within the County right-of-way, or written confirmation from the permittee that the project has been completed to the specifications submitted with the application shall be provided within thirty (30) working days of the project's completion.

**Section 16. Liability, Indemnification and Insurance.**

A. In securing a permit, the Permittee, on his/its own behalf, or its Excavator warrants and represents that he/it has in place a program of insurance such as to enable the party to pay the tort liabilities limits as set forth in NMSA 1978, §41-4-19.

B. The Permittee, on his/its own behalf, or its Excavator further warrants and represents he/it shall maintain, throughout the term of the project, liability insurance or proof of self insurance with regard to all liabilities assumed herein.

C. The Permittee agrees to assume liability and be responsible for actions that result from any injury or damage that occurs while an excavation project is being performed by excavator if said injury or damage is caused by negligent act(s) and /or omissions of the excavator. This provision shall not limit the rights of the Permittee to seek reimbursement or contribution from the excavator for damages caused by the excavator. Such liability and responsibility shall remain from the time that the excavation project is commenced until it is completed and approved by the County Road Superintendent or his designee. The County Road Superintendent or his designee must give to the Permittee, within ten (10) days of receipt of written notice of completion, written approval of an excavation project or written notice of defects which must be corrected in order for the Permittee to obtain approval for the project. Notice of completion shall be given by the Permittee or Excavator to the County Road Superintendent by certified mail. Notice of approval or of the defects shall also be given by certified mail.

D. The Permittee agrees to initiate and pay any costs associated therewith, within five (5) business days of completion of the excavation project, the transfer of title to all improvements, such as cattle guards or other items but not utility systems, installed on the County right-of-way, after said items and property have been installed and accepted by the County Road Superintendent or his designee.

E. The County shall notify the Permittee within thirty (30) days after the presentation of any claim or demand, whether by suit or otherwise, made against the County on account of any alleged act or conduct on the part of the Excavator arising from the activities carried out under authority of this Ordinance.

**Section 17. Prohibition.** Except in case of emergency as forth herein, it shall be unlawful for any person to excavate in County rights-of-way without the prior issuance of a permit pursuant to Section 5 hereof.

**Section 18. Enforcement.** This Ordinance may be enforced by the County by the filing of a Complaint in a court of appropriate jurisdiction in Lincoln County. Persons authorized to file Complaints are the County Road Superintendent, County Attorney, or other person duly authorized for the purpose by the Board Of County Commissioners of Lincoln County.

**Section 19. Penalty for Violations.**

A. Any person not giving the notice or securing the permit required by this Ordinance shall, upon conviction, be subject to a fine not to exceed Three Hundred (\$300.00) Dollars for each separate offense.

B. Any person who opens an excavation and fails to provide the adequate warning devices as required by this Ordinance shall be subject to a fine not to exceed Three Hundred Dollars (\$300.00) for each separate offence. For the purpose of this section, each day the violation continues after the Permittee has received written notice of the deficiency in the warning devices from the County Road Superintendent and fails to commence action within twenty-four (24) hours and otherwise fails to correct said violation within five (5) working days, shall be considered a separate offense.

C. Any person who performs an excavation project on any system and fails to conform to any provisions set forth in this Ordinance except those found in Paragraph A and B above, or other Federal or State laws Three Hundred Dollars (\$300.00) for each separate offense. For the purposes of this section, each day the violation continues after the Permittee has received written notice from the County Road Superintendent of specific violations of this Ordinance and fails to commence corrective action within twenty-four (24) hours and otherwise fails to correct said violation with five (5) working days, shall be considered a separate offence.

D. Permit fees will be doubled if work has commenced prior to a permit being issued, other than in a case of an emergency, as provided hereunder in Section 9. Paying double fees does not waive other penalties.

**Section 20. Civil Liability.** Nothing contained herein shall be construed to bar the County or other persons injured or otherwise damaged by the acts of Excavator from pursuing separate civil remedies at law or in equity against the Excavator.

**Section 21. Severability.** It is hereby declared to be the intention of the Board of County Commissioners that the sections, paragraphs, sentences, clauses and phrases of this Ordinance shall be deemed severable, and if any phrase, clause, sentence, paragraph or section of this Ordinance is declared unconstitutional or otherwise invalid by the valid judgment of a court of competent jurisdiction, such unconstitutionality or invalidity shall not affect any of the remaining phrases, clauses, sentences, paragraphs or sections hereof.

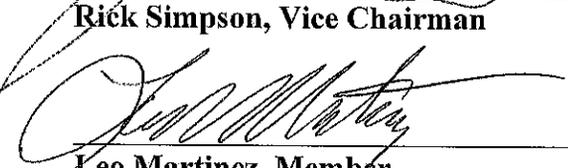
**Section 22. Effective Date.** This Ordinance shall become effective thirty (30) days after being enacted by the Board of County Commissioners of Lincoln County and published in a manner in which County Ordinances are recorded by the Clerk of Lincoln County, at which time Ordinance No. 2001-13 shall be repealed.

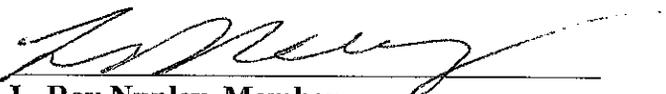
PASSED, APPROVED AND ADOPTED this 21 day of FEBRUARY, 2002.

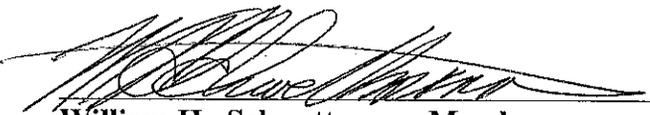
**BOARD OF COUNTY COMMISSIONERS  
OF LINCOLN COUNTY, NEW MEXICO**

  
\_\_\_\_\_  
Rex Wilson, Chairman

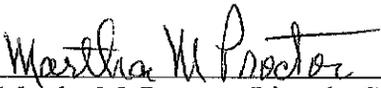
  
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Rick Simpson, Vice Chairman

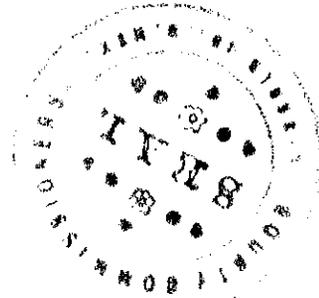
  
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Leo Martinez, Member

  
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L. Ray Nunley, Member

  
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William H. Schwettmann, Member

**ATTEST:**

  
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Martha M. Proctor, Lincoln County Clerk



county atty/wm/ordinances/road cuts final