CITY OF WEST DES MOINES
CITY COUNCIL MEETING COMMUNICATION

DATE: May 4, 2015

ITEM: Resolution - Approval of License Agreement between the City of West Des Moines and the Des Moines Water Works for the Installation of Optical Fiber

FINANCIAL IMPACT: Installation costs to be reimbursed by Microsoft Corporation

BACKGROUND: A term of the Alluvion Development Agreement between the City and Microsoft Corporation requires the City to coordinate the installation of optical fiber necessary to serve the development. A portion of the installation will be on property owned by Des Moines Water Works ("DMWW"). The attached License Agreement sets forth the terms and conditions between the City and DMWW to allow the City and its contractors access to DMWW property to conduct the installation. All actual costs incurred by the City for installation of the fiber will be reimbursed by Microsoft. The Agreement was approved by the Des Moines Water Works Board of Trustees on March 25, 2015.

OUTSTANDING ISSUES (if any): None

RECOMMENDATION: Adopt the Resolution approving the Agreement between the City and Des Moines Water Works for the Installation of Optical Fiber

Lead Staff Member: Richard J. Scieszinski, City Attorney

STAFF REVIEWS

Department Director	Richard J. Scieszinski, City Attorney RJS
Appropriations/Finance	
Legal	
Agenda Acceptance	RTJ

PUBLICATION(S) (if applicable)

Published In	
Dates(s) Published	

SUBCOMMITTEE REVIEW (if applicable)

Committee	N/A		
Date Reviewed			
Recommendation			

RESOLUTION NO._____

AUTHORIZING APPROVAL OF A LICENSE AGREEMENT BETWEEN THE CITY OF WEST DES MOINES, IOWA AND THE DES MOINES WATER WORKS FOR THE INSTALLATION OF OPTICAL FIBER

WHEREAS, the City of West Des Moines and Microsoft Corporation have entered into an agreement related to the development of the Project Alluvion Data Center; and

WHEREAS, a term of the agreement requires the City to coordinate the installation of optical fiber necessary to serve the data center; and

WHEREAS, because a portion of the optical fiber will be located on property owned by the Des Moines Water Works ("DMWW"), the City and DMWW have negotiated a License Agreement that will allow the City and its contractors to access DMWW property; and

WHEREAS, the License Agreement, which is beneficial to both parties, sets forth the terms and conditions under which installation of the optical fiber will occur; and

WHEREAS, it is in the best interest of the City of West Des Moines to approve the License Agreement between the City and the Des Moines Water Works.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF WEST DES MOINES, IOWA THAT:

1. The License Agreement between the City of West Des Moines and the Des Moines Water Works is approved.

2. The Mayor is authorized to sign the Agreement and the City Clerk is directed to attest to the Mayor's signature.

PASSED AND ADOPTED this 4th day of May, 2015.

_____
Steven K. Gaer, Mayor

ATTEST:

_____
Ryan T. Jacobson, City Clerk

LICENSE AGREEMENT BETWEEN THE CITY OF WEST DES MOINES, IOWA AND THE DES MOINES WATER WORKS FOR THE INSTALLATION OF OPTICAL FIBER

THIS LICENSE AGREEMENT (hereinafter the "Agreement") is entered this 24th day of March, 2015, by and between the City of West Des Moines, Iowa, a municipality organized under the laws of the State of Iowa, (hereinafter "City") and the Board of Water Works Trustees of the City of Des Moines, Iowa, a municipal utility organized and existing under Chapter 388, Code of Iowa and also known as Des Moines Water Works (hereinafter "DMWW").

WHEREAS, the parties acknowledge that the City and Microsoft Corporation have entered into an agreement for the installation of optical fiber related to the construction of a data center by Microsoft in the City of West Des Moines, and that in conjunction with the construction of the data center and pursuant to the agreement with Microsoft, the City has identified certain real property owned by DMWW, located in Dallas County and Polk County, Iowa, commonly known as Maffitt Reservoir (hereinafter "Parent Parcel") that is favorable for locating a portion of the optical fiber necessary to serve the Microsoft data center; and

WHEREAS, the parties further acknowledge that subsequent to installation by the City, Microsoft Corporation will take ownership of and responsibility for the optical fiber, with the terms and conditions regarding the location and ownership of the optical fiber on DMWW property to be set forth in an easement agreement between Microsoft Corporation and DMWW; and

WHEREAS, prior to execution of the easement agreement, it is necessary for the City and DMWW to establish the terms and conditions under which the City will be allowed to access and install the optical fiber on the DMWW property, legally described as:

Shown on the attached Acquisition Plat identified as Exhibit "1"
(hereinafter "Property"),

subject to the terms and conditions of this License Agreement.

NOW, THEREFORE, in consideration of the foregoing recitals, covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, the parties agree as follows:

1. GRANT OF LICENSE. DMWW grants to the City, its officials, employees, contractors, agents and assigns (collectively "City) full access to the Property for the purpose of locating and installing optical fiber, including but not limited to surveying, grading and storing materials and equipment related to the installation of the optical fiber and appurtenances thereto (the "Project").

2. DURATION. The City shall be entitled to access the Property on or after execution of this License Agreement by DMWW and shall be entitled to use the Property for the reasons set forth in this Agreement until the latter of acceptance of the Project by the West Des Moines City Council ("Project completion") or upon approval of an

easement agreement between Microsoft Corporation and DMWW ("easement approval"). Upon Project completion or easement approval, this License Agreement shall terminate and be of no further force or effect whatsoever.

3. COST PAID BY CITY. The City shall be responsible for any and all costs and expenses related to use of the Property during the term of this Agreement.

4. PROPERTY MAINTENANCE. Prior to Project completion, unless otherwise agreed by the Parties, the City shall remove all equipment and materials from the Property and restore the Property, reasonable wear and tear excepted, to the condition in which the Property existed at the time the Project commenced.

5. SIGNAGE. Signage on the Property shall be limited to contractor identification signage in conformance with the West Des Moines Code of Ordinances.

6. TAXES. No real property taxes shall be assessed against or payable by City for the Property.

7. PROPERTY AND LIABILITY INSURANCE.

   A. The City shall be solely responsible for providing insurance on any and all personal property and improvements the City maintains, constructs and/or installs on the Property. DMWW shall have no liability whatsoever or be responsible for the personal property of City.

   B. The City and its contractors and sub-contractors shall maintain liability insurance complying with the provisions of the attached Liability Insurance Requirements identified as Exhibit "2".

8. HOLD HARMLESS AND INDEMNIFICATION. The City shall protect, defend, indemnify and hold harmless DMWW, its elected officers, agents, employees, successors and assigns from and against all claims, demands, actions, judgments, settlements, or other costs, including reasonable attorneys' fees, which may be incurred or sustained due to the negligent or willful misconduct attributed to the City, its consultants, contractors, agents and assigns related to use of the Property by City during the term of this License Agreement. The City shall provide DMWW with prompt notice of any claim, demand or action and all necessary information and assistance to allow DMWW, at its option, to defend or settle such claim, demand or action. In the event that any such claim, demand, or action is caused by the joint or concurrent negligence of both the City and DMWW, the loss, expense, or claim shall be borne by each party in proportion to its negligence.

9. CITY ENVIRONMENTAL COMPLIANCE. The City represents, warrants, and agrees:

   A. The City's use of the Property will not include the use, generation, storage or disposal of any Hazardous Materials without City first obtaining the written consent of DMWW. City understands and agrees that DMWW's consent is at DMWW's sole option and complete discretion and that such consent may be

withheld or may be granted with any conditions or requirements that DMWW deems appropriate.

B. The City shall be fully liable for all costs and expenses related to the use, storage, removal and disposal of Hazardous Materials used or kept on the Property by City, and City shall give immediate notice to DMWW of any violation or any potential violation of any environmental regulation, rule, statute or ordinance relating to the use, storage or disposal of any hazardous substance.

C. The City shall, upon demand of DMWW, and at the City's sole cost and expense, promptly take all actions to remediate the Property or Parent Parcel which are required by any federal, state or local governmental agency or political subdivision or which are reasonably necessary to mitigate environmental damages or to allow full economic use of the Property or Parent Parcel, which remediation is necessitated from the presence upon, about or beneath the Property or Parent Parcel of a Hazardous Material existing or introduced in violation of this Paragraph by the City. Such actions shall include but not be limited to the investigation of the environmental condition of the Property or Parent Parcel, the preparation of any feasibility studies, reports or remedial plans, and the performance of any cleanup, remediation, containment, operation, maintenance, monitoring or actions necessary to restore the Property or Parent Parcel to the condition existing prior to the introduction of Hazardous Material upon, about or beneath the Property or Parent Parcel notwithstanding any lesser standard of remediation allowable under applicable law or governmental policies.

10. ENVIRONMENTAL INDEMNITIES. The City, its, grantees, successors, and assigns shall indemnify, defend, reimburse and hold harmless DMWW and its trustees, officers, employees, attorneys, and agents from and against any and all claims, causes of action, damages, loss, costs, expense, penalties, fines, lawsuits, liabilities, attorney fees, engineering and consulting fees, including, but not limited to, injury or death to persons or damage to property, which may result from, or arise out of, or be in any manner connected with, or arising from the presence or release of Hazardous Materials upon, about or beneath the Property or the Parent Parcel, occurring by reason of act or omission of the City or their respective employees, officers, agents, contractors and vendors.

The duties and indemnifications in this paragraph shall survive expiration or termination of this Agreement.

11. GENERAL COVENANTS.

A. The City shall take, and shall cause its contractors to take, all steps necessary, appropriate, and proper to conduct all activity hereunder in a safe, orderly, and environmentally proper manner without undue risk to any person or to the property of DMWW or others and without any nuisance to others. Such steps shall include adequate provisions for security, waste containment, air and water discharge control and sanitation. The City shall be solely responsible to

conduct work hereunder in a proper manner and to determine the nature and extent of all steps necessary and proper to achieve such objective.

B. The City shall comply, and shall assure that all of its suppliers, vendors, contractors, and employees comply with all applicable laws and regulations. Without limiting the generality of the foregoing, the City shall obtain all required federal, state, and local permits and shall comply with applicable safety, health and regulations. The City will furnish DMWW with evidence of compliance upon request.

12. TERMINATION. This Agreement shall terminate without notice, unless Microsoft Corporation and DMWW agree to terms and conditions of the easement agreement regarding the location and ownership of the optical fiber on DMWW property on or before May 1, 2015. Such terms and conditions include but are not limited to:

A. Horizontal and vertical alignment of the optical fiber.

B. Positions of access manholes and other appurtenances.

C. Future relocation of the optical fiber at Microsoft Corporation's expense in those areas where future land use by DMWW requires such relocation.

13. NOTICES. All notices or invoices which the Parties are authorized or required to give one another pursuant to this Agreement shall be in writing and may be personally delivered or sent by ordinary mail to the addresses hereafter provided. Mailed notices or invoices shall be deemed to be received by the Party to whom directed when they are postmarked. Such notices and invoices shall be delivered or mailed to the following persons at the addresses listed:

Notices to DMWW:	Notices to City:
Vern Rash, P.E., L.S. Des Moines Water Works 2201 George Flagg Parkway Des Moines, IA 50321 (515) 283-8733 rash@dmww.com	Duane Wittstock, City Engineer City of West Des Moines 4200 Mills Civic Parkway West Des Moines, IA 50265 (515) 222-3620 duane.wittstock@wdm.iowa.gov

14. AMENDMENT OF AGREEMENT. This Agreement may be amended only by written agreement signed by both Parties.

15. ASSIGNMENT OF AGREEMENT. Neither Party may assign this Agreement to a third party without the written consent of the other Party.

16. NO THIRD PARTY BENEFICIARIES. Nothing in this Agreement shall be construed to create in any third party, or in favor of any third party, any right(s), license(s), power(s) or privilege(s).

17. SEVERABILITY. If any section, provision or part of this Agreement shall be found to be invalid or unconstitutional, such finding shall not affect the validity of the Agreement as a whole or any section, provision or part thereof not found to be invalid or unconstitutional.

18. GOVERNING LAW; JURISDICTION. This Agreement shall be governed by and interpreted in accordance with the laws of the State of Iowa. Lawsuits brought by either Party in connection with this Agreement shall be heard and tried in Polk County District Court.

19. ENTIRE AGREEMENT. This Agreement represents the entire agreement between the Parties. Any subsequent change or modification to the terms of this Agreement shall be in the form of a duly executed addendum to this Agreement.

20. EXECUTION OF AGREEMENT. This Agreement shall be executed in two counterparts, each of which so executed shall be deemed to be an original.

CITY OF WEST DES MOINES, IOWA

_____

Steven K. Gaer, Mayor

Attest:

_____

Ryan Jacobson, City Clerk

STATE OF IOWA)
) SS
COUNTY OF POLK)

This document was acknowledged before me on the _____ day of March, 2015 by Steven K. Gaer, Mayor of the City of West Des Moines, Iowa and Ryan Jacobson, City Clerk on behalf of the City of West Des Moines, for whom the document was executed.

_____

Notary Public in and for said State

BOARD OF WATER WORKS TRUSTEES OF THE CITY OF DES MOINES, IOWA

Graham R. Gillette
Chairperson

Attest:

William G. Stowe
Chief Executive Officer and General Manager

STATE OF IOWA)
) ss
COUNTY OF POLK)

On this 25 day of March, 2015, before me, a Notary Public in and for the State of Iowa, personally appeared Graham R. Gillette and William G. Stowe, to me personally known, and, who being by me duly sworn, did say that they are the Board Chairperson and the Chief Executive Officer and General Manager of the Board of Water Works Trustees of the City of Des Moines, Iowa, that no seal has been procured by the entity; that the attached instrument was signed on behalf of the said entity by authority of its Board as contained in the resolution adopted by the Board on the 24 day of March, 2015 and that Graham R. Gillette and William G. Stowe acknowledged the execution of the instrument to be the voluntary act and deed of the Board of Water Works Trustees of the City of Des Moines, Iowa, by it and by them voluntarily executed.

Laura C. Sarcone
Notary Public in and for said State

LAURA C SARCONE
Commission Number 767297
My Commission Expires
December 12, 2017

EXHIBIT '1' - ACQUISITION PLAT

OWNERS

CITY OF DES MOINES FOR THE USE AND BENEFIT OF THE BOARD OF WATER WORKS TRUSTEES OF THE CITY OF DES MOINES, IOWA

UTILITY EASEMENT DESCRIPTION:

A PART OF THE NORTH HALF OF THE NORTHEAST QUARTER AND A PART OF THE NORTH HALF OF THE NORTHWEST FRACTIONAL QUARTER OF SECTION 31, TOWNSHIP 78 NORTH, RANGE 25 WEST AND A PART OF THE NORTHEAST QUARTER OF THE NORTHEAST QUARTER OF SECTION 36, TOWNSHIP 78 NORTH, RANGE 26 WEST AND A PART OF THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 25, TOWNSHIP 78 NORTH, RANGE 26 WEST AND A PART OF THE WEST HALF OF THE SOUTHWEST FRACTIONAL QUARTER AND A PART OF THE SOUTHWEST QUARTER OF THE NORTHWEST FRACTIONAL QUARTER OF SECTION 30, TOWNSHIP 78 NORTH, RANGE 25 WEST, ALL BEING WEST OF THE FIFTH PRINCIPAL MERIDIAN, DALLAS COUNTY AND POLK COUNTY, IOWA AND MORE PARTICULARLY DESCRIBED AS A 20.00 FOOT WIDE EASEMENT BEING 10.00 FEET ON BOTH SIDES OF THE FOLLOWING DESCRIBED CENTERLINE:

COMMENCING AT THE NORTH QUARTER CORNER OF SAID SECTION 31; THENCE SOUTH 00°13'42" EAST ALONG THE WEST LINE OF THE NORTHEAST QUARTER OF SAID SECTION 31, A DISTANCE OF 610.22 FEET; THENCE NORTH 89°46'18" EAST, 1352.93 FEET TO THE WEST LINE OF THE RIGHT OF WAY OF INTERSTATE 35 AND THE POINT OF BEGINNING; THENCE SOUTH 82°48'12" WEST, 621.65 FEET; THENCE SOUTH 79°57'08" WEST, 800.00 FEET; THENCE SOUTH 77°23'01" WEST, 475.28 FEET; THENCE WESTERLY ALONG A CURVE CONCAVE SOUTHERLY WHOSE RADIUS IS 200.00 FEET, WHOSE ARC LENGTH IS 25.81 FEET AND WHOSE CHORD BEARS SOUTH 73°41'14" WEST, 25.79 FEET; THENCE SOUTH 69°59'27" WEST, 161.26 FEET; THENCE NORTH 00°00'00" EAST, 829.65 FEET; THENCE NORTH 89°58'08" WEST, 841.97 FEET; THENCE SOUTH 66°35'31" WEST, 861.99 FEET; THENCE WESTERLY ALONG A CURVE CONCAVE NORTHERLY WHOSE RADIUS IS 200.00 FEET, WHOSE ARC LENGTH IS 79.58 FEET AND WHOSE CHORD BEARS SOUTH 77°59'54" WEST, 79.06 FEET; THENCE SOUTH 89°28'41" WEST, 83.20 FEET; THENCE NORTH 04°22'51" EAST, 107.25 FEET; THENCE NORTHWESTERLY ALONG A CURVE CONCAVE SOUTHWESTERLY WHOSE RADIUS IS 100.00 FEET, WHOSE ARC LENGTH IS 126.43 FEET AND WHOSE CHORD BEARS NORTH 31°50'16" WEST, 118.17 FEET; THENCE NORTH 68°03'23" WEST, 99.18 FEET; THENCE NORTHWESTERLY ALONG A CURVE CONCAVE NORTHEASTERLY WHOSE RADIUS IS 1000.00 FEET, WHOSE ARC LENGTH IS 100.80 FEET AND WHOSE CHORD BEARS NORTH 65°10'08" WEST, 100.76 FEET; THENCE NORTH 62°16'52" WEST, 129.68 FEET; THENCE NORTH 14°06'28" EAST, 776.20 FEET; THENCE NORTHERLY ALONG A CURVE CONCAVE WESTERLY WHOSE RADIUS IS 1000.00 FEET, WHOSE ARC LENGTH IS 77.49 FEET AND WHOSE CHORD BEARS NORTH 11°53'17" EAST, 77.47 FEET; THENCE NORTH 09°40'05" EAST, 1525.55 FEET; THENCE NORTHERLY ALONG A CURVE CONCAVE EASTERLY WHOSE RADIUS IS 400.00 FEET, WHOSE ARC LENGTH IS 75.04 FEET AND WHOSE CHORD BEARS NORTH 15°02'33" EAST, 74.93 FEET; THENCE NORTH 20°25'02" EAST, 213.57 FEET; THENCE NORTH 17°01'16" WEST, 899.07 FEET TO THE NORMAL HIGH WATER LINE OF THE RACCOON RIVER AND THE POINT OF TERMINUS.

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GRIMES, IOWA 50111
PH: (515) 369-4400 Fax: (515) 369-4410

RETURN TO: CIVIL DESIGN ADVANTAGE, 3405 SE CROSSROADS DRIVE, SUITE G, GRIMES, IA. 50111, PH: 369-4400 FAX: 369-4410

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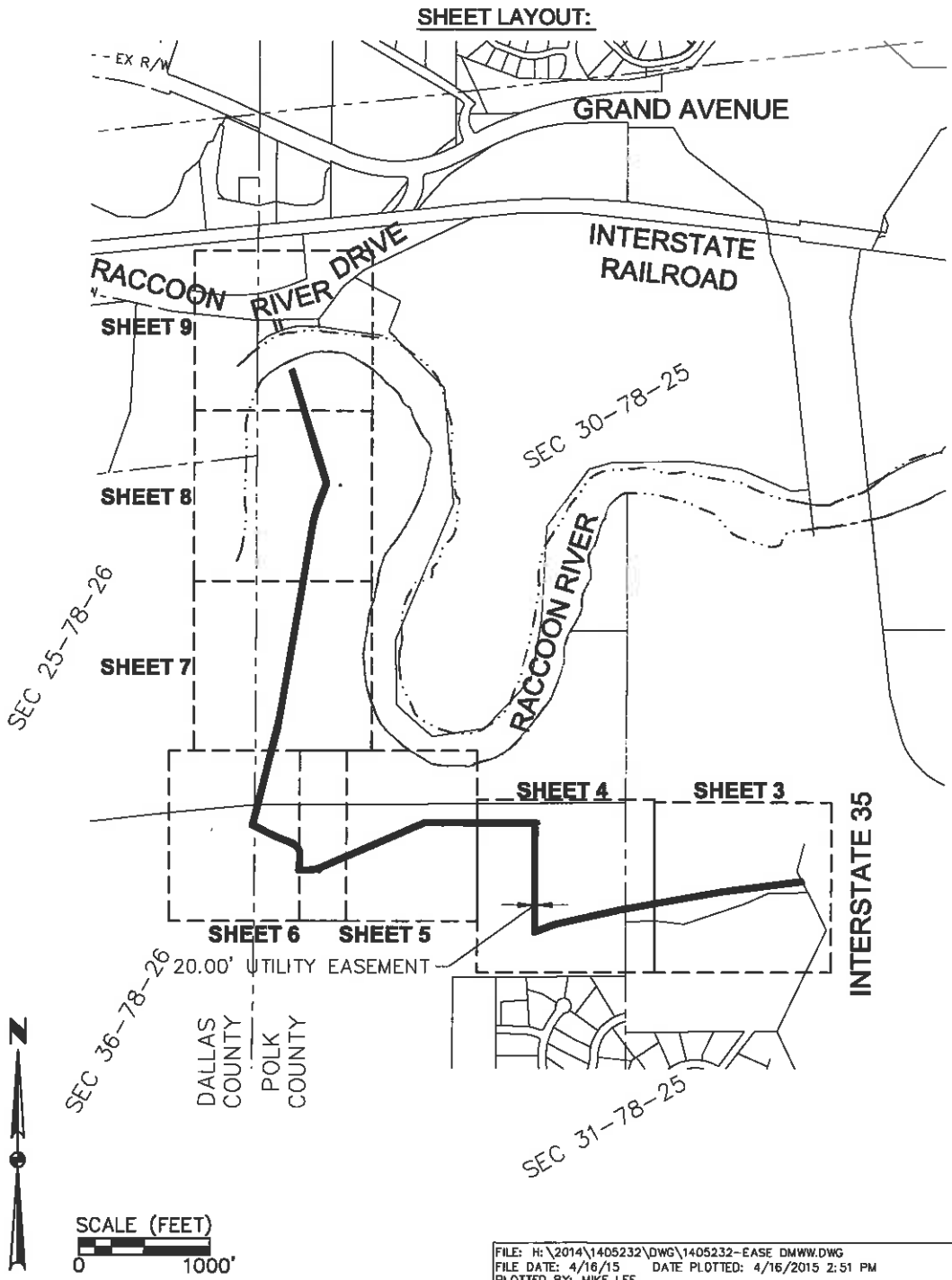

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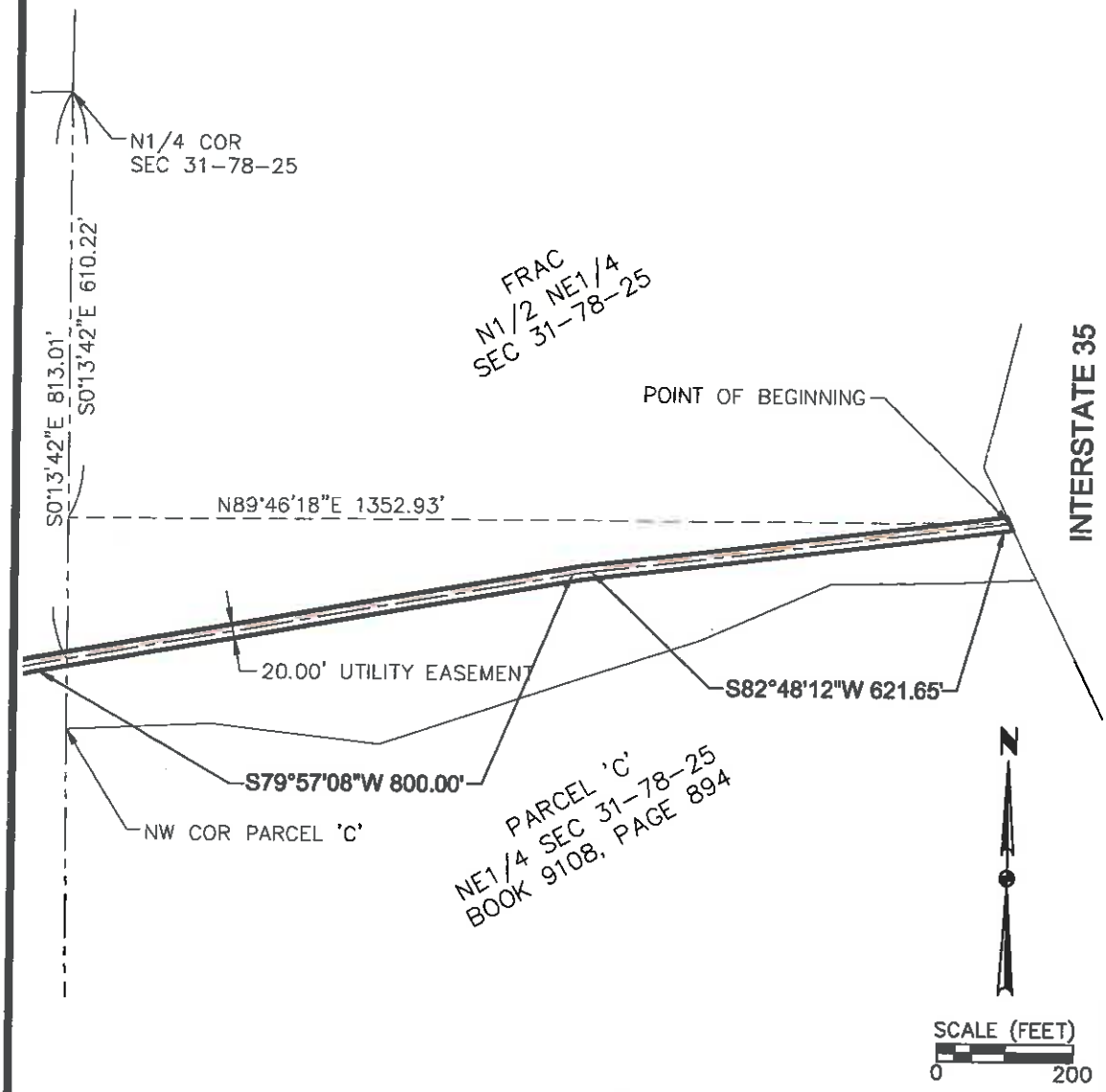

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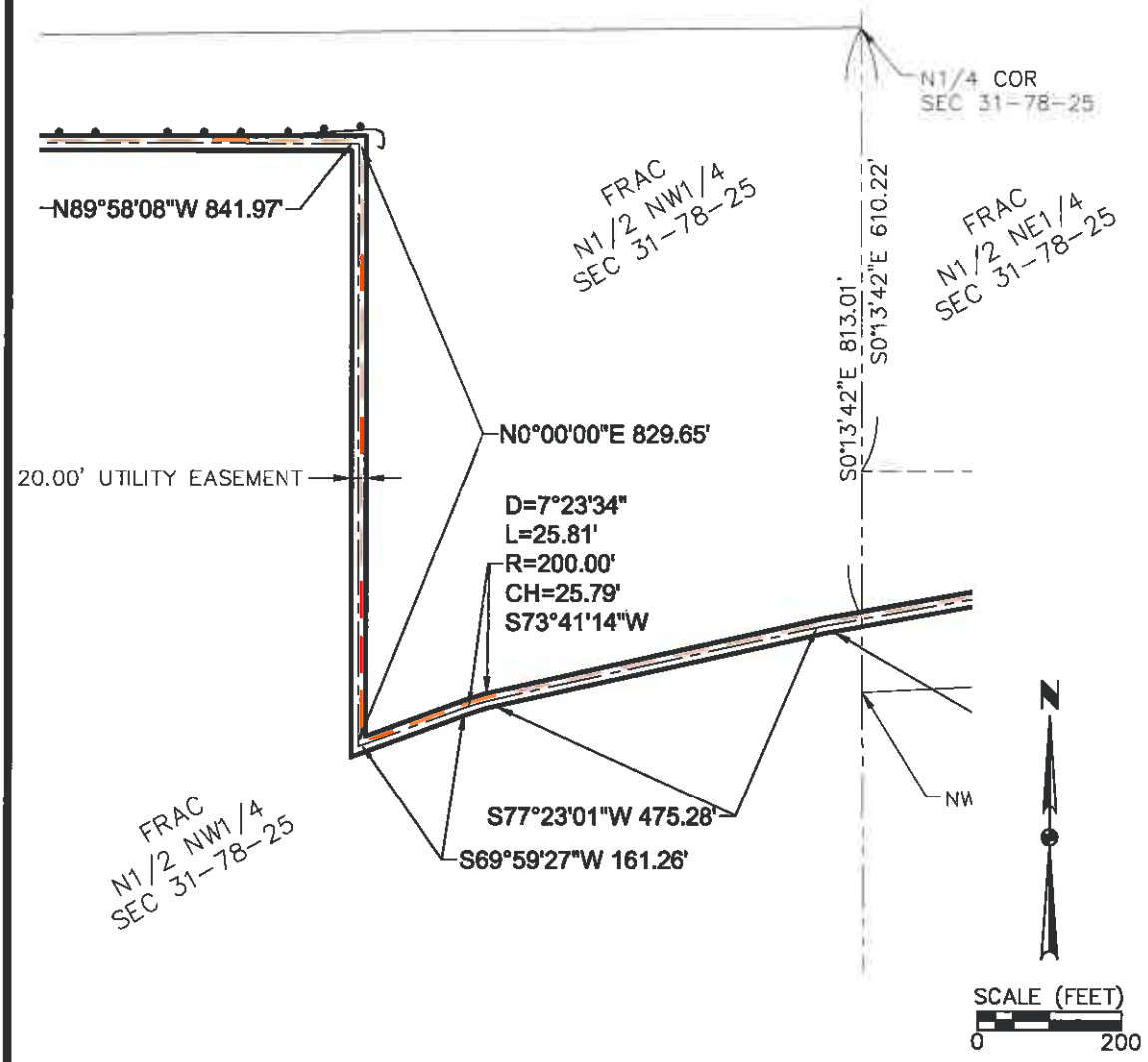

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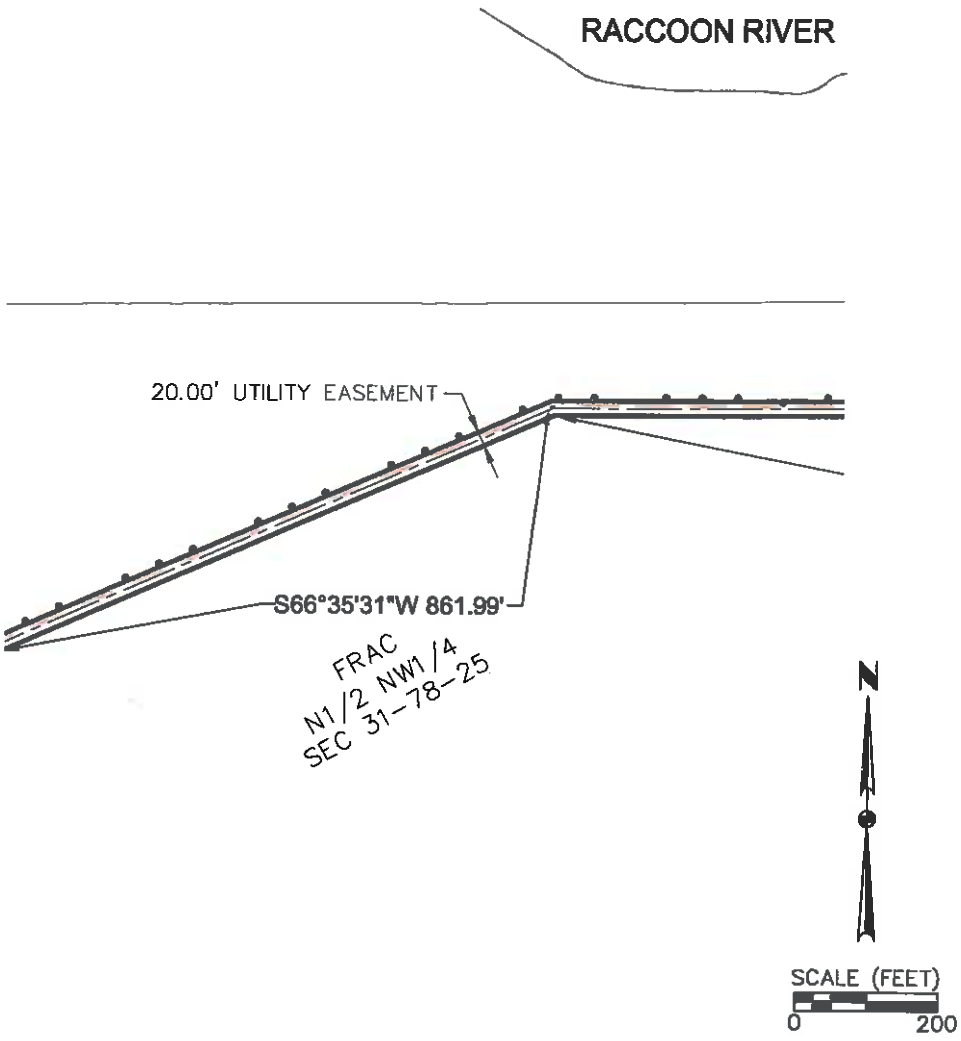

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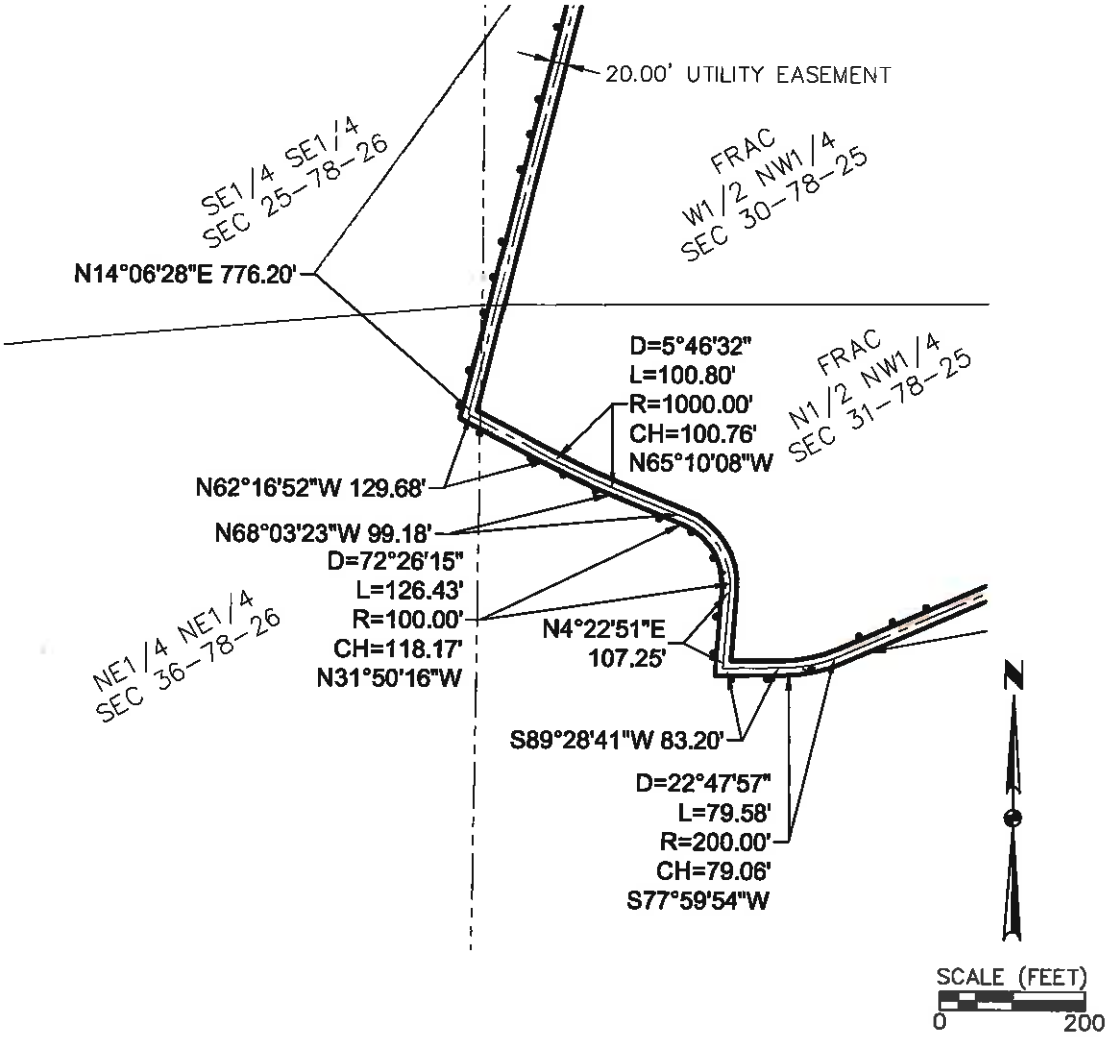

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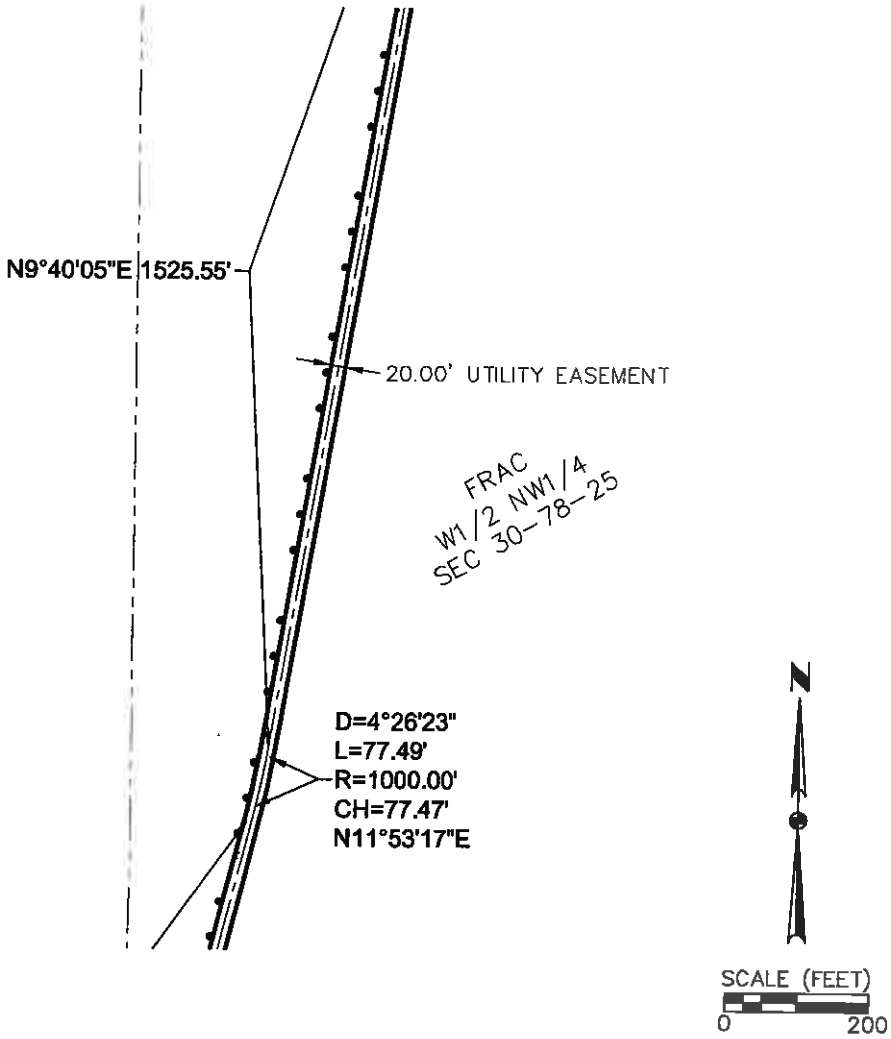

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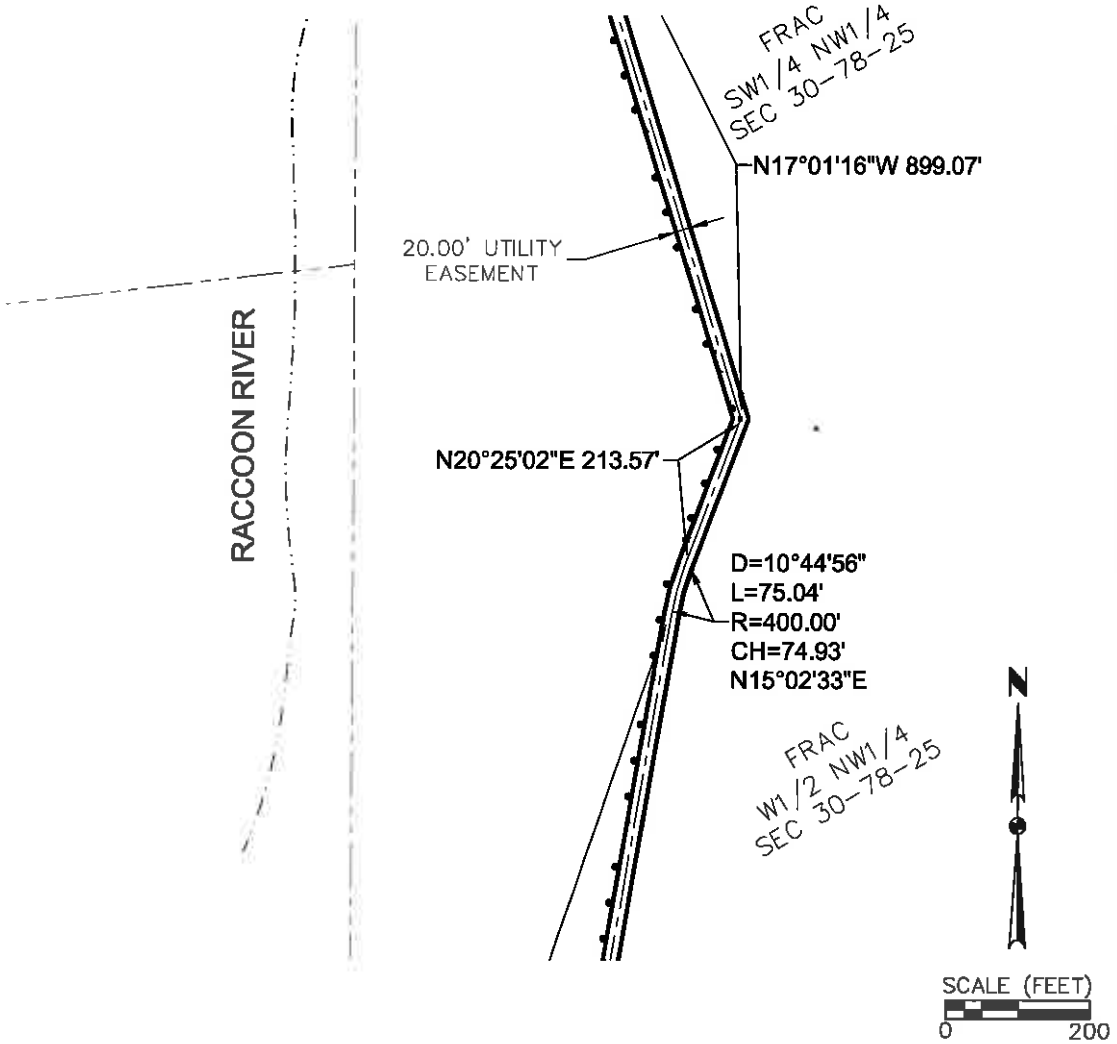

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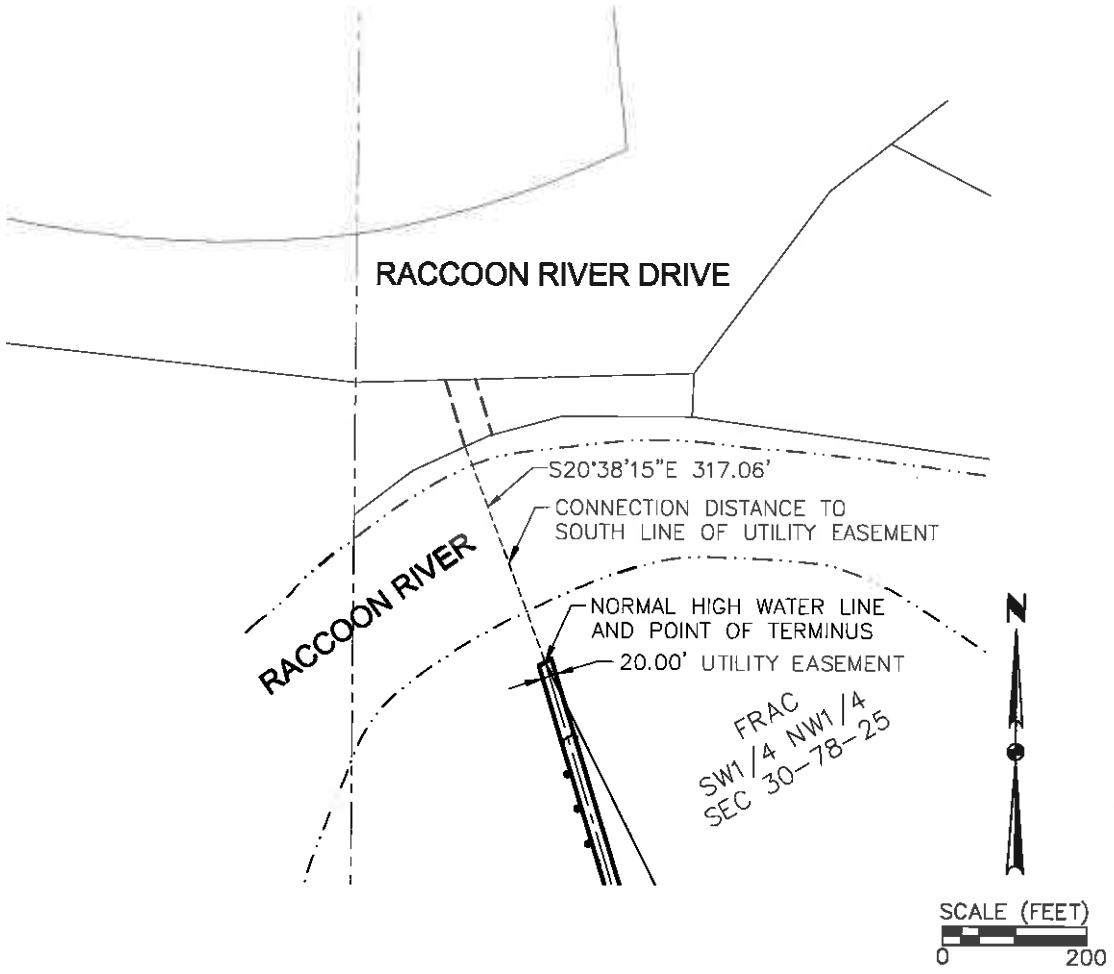

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