

**RESOLUTION NO. 1518
CITY OF PRINEVILLE, OREGON**

**A RESOLUTION AUTHORIZING DEVELOPMENT AGREEMENT BETWEEN CITY
OF PRINEVILLE AND VITESSE, LLC**

Whereas, Vitesse, LLC (“Vitesse”) owns and operates a data center within Prineville city limits that requires significant fire suppression requirements necessitating certain improvements to improve water flow capacity to the property.

Whereas, Vitesse desires to have City of Prineville (“City”) procure materials and constructions services to construct, install, and maintain 7,000 linear foot water pipe consisting of both 24 inch and 30 inch pipe.

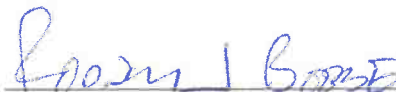
Whereas, City is willing to contract, install, and maintain the Projects and Vitesse pursuant to a development agreement.

Whereas, City and Vitesse have negotiated a Development Agreement (“Agreement”), which is attached to this Resolution and incorporated herein.

Whereas, City staff believes it is in the best interest of the City to approve and execute the Agreement.

Now, Therefore, the City of Prineville resolves that the Development Agreement attached to this Resolution between the City and Vitesse is hereby approved and that the Mayor is authorized and instructed to sign such Agreement on behalf of the City.

Approved by the City Council this 12th day of April, 2022.



Rodney J. Beebe, Mayor

ATTEST:



Lisa Morgan, City Recorder

DEVELOPMENT AGREEMENT
Between
City of Prineville and Vitesse, LLC

This Agreement (“Agreement”) is made and entered into as of the date last written below (the “Effective Date”), by and between the **City of Prineville**, an Oregon municipal corporation (“City”) and **Vitesse, LLC**, a Delaware limited liability company (“User”); each of City and User are “Party” and together, the “Parties.”

RECITALS

- A. Whereas, User owns and operates a data center on real property located within City and generally depicted on Exhibit A, attached hereto and incorporated herein.
- B. Whereas, the property generally depicted in Exhibit A has significant fire suppression needs, and the Parties are desirous of making certain improvements to improve water flow capacity in the area.
- C. Whereas, User desires to have City procure materials and construction services to construct, install, and maintain a 2,240 linear foot water pipe consisting of 24 inch polyvinyl chloride (“PVC”) or high-density polyethylene (“HDPE”) pipe, which will run from Wells to Millican and service the User’s property by improving fire flow capabilities and system redundancy in the event of a fire (“Project 1B”).
- D. Whereas, User also desires to have City procure materials and construction services to construct, install, and maintain a 4,425 linear foot water pipe consisting of 30 inch PVC or HDPE pipe, which will run from tanks to Wells and service User’s property by improving fire flow capabilities and system redundancy in the event of a fire (“Project 2B,” collectively with Project 1B, the “Projects”).
- E. Whereas, the general location of the Projects is depicted on Exhibit B, attached hereto and incorporated herein.
- F. Whereas, User directly contracted with an engineer (the “Engineer”) to provide design and engineering services for the Projects.
- G. Whereas, City has estimated that the total cost of Project 1B is THREE MILLION ONE-HUNDRED EIGHTY THOUSAND DOLLARS (\$3,180,000.00) and has estimated the total costs of Project 2B is FIVE MILLION ONE-HUNDRED NINETY THOUSAND DOLLARS (\$5,190,000.00) as set forth on Exhibit C, attached hereto and incorporated herein.
- H. Whereas, City is willing to construct, install, and maintain the Projects.

NOW, THEREFORE, in consideration of the foregoing, and the mutual covenants and agreements contained herein, including the Recitals which are incorporated herein by reference, which are relied upon by the Parties and which constitute part and parcel of this Agreement; and

other good and valuable consideration the receipt and sufficiency of which are expressly acknowledged by the Parties, City and User hereby agree as follows:

1. Procurement. City will solicit and procure all materials and construction services necessary to construct, install, and maintain the Projects. City's solicitation and procurement process will include the solicitation of bids for purchase and installation of PVC and HDPE piping and ancillary materials for the Projects with pipe sizes consistent with the Recitals, although only one material type will be used to construct the Projects. All procurement activities must be conducted in accordance with Oregon's Public Contracting Code (ORS 279A, ORS 279B and ORS 279C), all applicable state and local contracting rules, and all applicable laws, rules and regulations relating to anti-corruption and anti-bribery.

2. Performance. City hereby agrees to complete and be responsible for the construction, installation, and maintenance of the Projects. During the course of each Project, City will:

2.1 monitor the budget and schedule of each Project and promptly notify User of any anticipated changes to the budget or schedule of either Project;

2.2 submit to User all applications for payment and invoices submitted by contractors and material suppliers for each Project;

2.3 submit to User all change order requests submitted by contractors for each Project;

2.4 coordinate all testing and inspections required by third parties;

2.5 promptly conduct all inspections City is obligated to perform; and

2.6 organize and conduct a final inspection with User, the Engineer, and each Project's contractor to confirm that the Project (i) is entirely complete in accordance with the Project's design, plans, and specifications and (ii) can be utilized by User for its intended purpose ("Final Completion").

3. Approval Authority. City will not execute any change order, request for substitution, construction contract amendment or other document authorizing changes to either Project's cost, schedule, or scope without User's prior written consent. User automatically consents, however, to change orders that are not objected to within 48 hours after User's receipt of the change order and a request for approval from City. User also automatically consents to other documents changing either Project's cost, schedule, or scope that are not objected to within fourteen days after User's receipt of the document and a request for approval from City.

4. Performance Bond. Unless exempted under ORS 279C.390, City will ensure that the contractor for each Project provides a performance bond in accordance with ORS 279C.380. The performance bond provided by the contractor must list User as an additional obligee and be in a form approved in writing by User.

5. Project Timelines. The Projects shall be completed in accordance with the design prepared by the Engineer and with all laws and regulations. City will achieve Final Completion for each Project as follows:

5.1 City will strive to achieve Final Completion of Project 1B no later than 210 days after the Effective Date of this Agreement.

5.2 City will strive to achieve Final Completion of Project 2B no later than 270 days after the Effective Date of this Agreement.

6. Consideration. In consideration of City's performance, User hereby agrees to pay City:

6.1 The entire cost of constructing the Projects (collectively, the "Project Costs"), which will not exceed EIGHT MILLION FOUR-HUNDRED THOUSAND DOLLARS (\$8,400,000.00) (the "Maximum Price"); and

6.2 An administrative fee equal to the lesser of (a) 10 percent (10%) of the Project Costs, or (b) \$840,000.

7. Payment Schedule. City may submit to User an invoice no more than once each month consisting of (1) all Project Costs incurred that have not been reimbursed and (2) a portion of the administrative fee equal to 10 percent of the Project Costs included in the invoice. The amount owed under each invoice shall also be reduced by retainage in accordance with Section 8. Payment shall be made, following review and approval of the invoice submitted by City, within thirty (30) days after User's receipt of the invoice. If User objects to the invoice submitted, User shall advise City in writing, giving reason therefore, within fifteen (15) days after User's receipt of said invoice.

Notwithstanding Section 6, in the event that City believes that the Project Costs will exceed the Maximum Price, City shall provide notice to User of its belief no sooner than sixty (60) days before the Maximum Price is exceeded. City will coordinate meetings among User, the Engineer, and the Project contractors to conduct value engineering analysis and explore opportunities for cost savings. Upon receiving a notice, User may elect to (1) suspend or terminate one or both Projects; (2) limit or modify the Projects; or (3) agree to amend the Agreement to increase the Maximum Price. User shall notify City of its election no later than thirty (30) days from receiving notice from City. Upon receiving User's election, the Parties hereby agree to endeavor, in good faith, to make any amendments required to the Agreement. Unless City fails to provide notice as set forth in this paragraph, City shall not be responsible for costs exceeding the Maximum Price.

8. Retainage. User shall withhold from each monthly payment retainage equal to ten percent (10%) of the administrative fee amount included in the invoice due to the City. The User will pay all retainage withheld under this Section within 30 days of Final Completion of Project 2B.

9. Progress Reports. City shall submit a progress report along with each monthly invoice that includes percentage completion data and summaries of progress for each Project based on their respective schedules and required dates of Final Completion. If the progress report indicates

that either Project is not projected to achieve Final Completion by the dates established in Section 5, then City will submit an acceleration plan summarizing the additional actions City will take to ensure completion in accordance with the dates established in Section 5. In addition, at User's request, the City will provide oral reports and presentations to User on the progress of the Projects.

10. Compliance. City and User agree to comply with all applicable laws, rules, and regulations, including but not limited to anti-corruption and anti-bribery, illegal kickbacks, illegal campaign contributions, import and export, trade sanctions, health and safety, the environment, and human rights.

10.1. Accurate Books and Records. The City will keep and maintain complete and accurate books and records in connection with its performance under this Agreement, including all Project Costs, and will retain these records for at least five (5) years after final payment under this Agreement. Upon request, City shall make these books and records available to User.

10.2. Notice and Cooperation. If City becomes aware of any violation or suspected violation of the laws set forth in Section 10 (Compliance) in connection with the performance of this Agreement, it shall provide prompt written notice to User setting forth the relevant facts and circumstances. City and User shall cooperate in good faith to review any violations or suspected violations, including by providing reasonable access to all relevant information, including documentation. The City's failure to cooperate with User shall be deemed a material breach of this Agreement.

11. Term. Unless terminated by the Parties, the term of this Agreement shall expire on the later of (1) ten (10) years after the date that Project 1B achieves Final Completion or (2) ten (10) years after the date that Project 2B achieves Final Completion.

12. Assignability of Agreement. This Agreement shall be fully assignable, in whole or in part, by either Party and shall bind and inure to the benefit of the Parties and their respective assigns and successors.

13. Confidentiality. Subject to the requirements of Oregon's Public Records Law (ORS 192), City shall not disclose at any time to any persons or entities any information that User identifies as confidential business information. If required by law to disclose confidential information, City shall redact or delete from the records it discloses, or makes available for inspection, all information designated by User as confidential. Promptly following City's receipt of a request to inspect or disclose copies of public records relating to this Agreement or the Projects, City shall give written notice and a copy of the request to User. City shall not allow inspection or disclose copies of any records until User has had at least fourteen (14) business days to determine whether to contest the right of the requestor to inspect or receive copies of the records.

14. Default; Remedy.

14.1 Default/Cure. The following shall constitute defaults on the part of a Party:

14.1.1 A breach of a material provision of this Agreement, whether by action or inaction of a Party which continues and is not remedied within ten (10) days after the other Party has given notice specifying the breach; provided that if the non-breaching Party determines that such breach cannot with due diligence be cured within a period of ten (10) days, the non-breaching Party may allow the breaching Party a longer period of time to cure the breach, and in such event the breach shall not constitute a default so long as the breaching Party diligently proceeds to affect a cure and the cure is accomplished within the longer period of time granted by the non-breaching Party; or

14.1.2 Any assignment by a Party for the benefit of creditors, or adjudication as a bankruptcy, or appointment of a receiver, trustee, or creditor's committee over a Party.

14.2 Remedies. Each Party shall have all available remedies at law or in equity to recover damages and compel the performance of the other Party pursuant to this Agreement. The rights and remedies afforded under this Agreement are not exclusive and shall be in addition to and cumulative with any and all rights otherwise available at law or in equity. The exercise by either Party of any one or more of such remedies shall not preclude the exercise by it, at the same or different time, of any other such remedy for the same default or breach or of any of its remedies for any other default or breach of the other Party, including, without limitation, the right to compel specific performance.

15. Amendment or Termination of Agreement. This Agreement may be amended or terminated by the mutual consent of the Parties and their successors in interest.

16. Miscellaneous Provisions.

16.1 Notices. A notice or communication under this Agreement by either Party shall be dispatched by registered or certified mail, postage prepaid, return receipt requested, and

16.1.1 In the case of a notice or communication to User, address as follows:

Vitesse, LLC
1 Hacker Way
Menlo Park, CA 94025
Attn: _____

With a copy to:

Vitesse, LLC
1 Hacker Way
Menlo Park, CA 94025
Attn: Real Estate Counsel

In the case of a notice or communication to City, addressed as follows:

City of Prineville
387 NE Third Street
Prineville, OR 97754
Attn: City Engineer

With a copy to:

Jered Reid
35 SE C Street, Suite D
Madras, Oregon 97741

or addressed in such other way in respect to a Party as that Party may, from time to time, designate in writing dispatched as provided in this section.

16.2 Headings. Any titles of the sections of this Agreement are inserted for convenience of reference only and shall be disregarded in construing or interpreting any of its provisions.

16.3 Waivers. No waiver made by either Party with respect to the performance, or manner or time thereof, of any obligation of the other Party or any condition inuring to its benefit under this Agreement shall be considered a waiver of any other rights of the Party making the waiver. No waiver by City or User of any provision of this Agreement or any breach thereof shall be of any force or effect unless in writing; and no such waiver shall be construed to be a continuing waiver.

16.4 Attorneys' Fees. In the event of a suit, action, arbitration, or other proceeding of any nature whatsoever, including, without limitation, any proceeding under U.S. Bankruptcy Code, is instituted to interpret or enforce any provision of this Agreement, or with respect to any dispute relating to this Agreement, including, without limitation, any action in which a declaration of rights is sought or an action for rescission, the prevailing Party shall be entitled to recover from the losing Party its reasonable attorneys', paralegals', accountants', and other experts' fees and all other fees, costs, and expenses actually incurred and reasonably necessary in connection therewith, as determined by the judge or arbitrator at trial or arbitration, as the case may be, or on any appeal or review, in addition to all other amounts provided by law. This provision shall cover costs and attorneys' fees related to or with respect to proceeding in Federal Bankruptcy Courts, including those related to issues unique to bankruptcy law.

16.5 Time of the Essence. Time is of the essence of this Agreement.

16.6 Choice of Law. This Agreement shall be interpreted under the laws of the State of Oregon.

16.7 Calculation of Time. All periods of time referred to herein shall include Saturdays, Sundays, and legal holidays in the State of Oregon, except that if the last day of any period falls on a Saturday, Sunday, or legal holiday in the State of Oregon, the period shall be extended to include the next day which is not a Saturday, Sunday, or such a holiday.

16.8 Construction. In construing this Agreement, singular pronouns shall be taken to mean and include the plural and the masculine pronoun shall be taken to mean and include the feminine and the neuter, as the context may require.

16.9 Severability. If any clause, sentence, or any other portion of the terms and conditions of this Agreement becomes illegal, null, or void for any reason, the remaining portions will remain in full force and effect to the fullest extent permitted by law.

16.10 Place of Enforcement. Any action or suit to enforce or construe any provision of this Agreement by any Party shall be brought in the Circuit Court of the State of Oregon for Crook County, or the United States District Court for the District of Oregon.

16.11 Good Faith and Reasonableness. The Parties intend that the obligations of good faith and fair dealing apply to this Agreement generally and that no negative inferences be drawn by the absence of an explicit obligation to be reasonable in any portion of this Agreement. The obligation to be reasonable shall only be negated if arbitrariness is clearly and explicitly permitted as to the specific item in question, such as in the case of a Party being given “sole discretion” or being allowed to make a decision in its “sole judgment.”

16.12 Condition of City Obligations. All City obligations pursuant to this Agreement which require the expenditure of funds are contingent upon future appropriations by City as part of the local budget process. Nothing in this Agreement implies an obligation on City to appropriate any such monies. This condition may not, however, limit any remedies available to City or User under this Agreement.

16.13 Cooperation in the Event of Legal Challenge. In the event of any legal action instituted by a third party or other governmental entity or official challenging the validity of any provision of this Agreement, the Parties agree to cooperate in defending such action.

16.14 Enforced Delay, Extension of Times of Performance. In addition to the specific provisions of this Agreement, performance by any Party shall not be in default where delays or default is due to war, insurrection, strikes, walkouts, riots, floods, drought, earthquakes, fires, casualties, acts of God, governmental restrictions imposed or mandated by governmental entities other than City, enactment of conflicting state or federal laws or regulations, new or supplementary environmental regulation, litigation or similar basis for excused performance which is not within reasonable control of the Party to be excused.

16.15 No Third-Party Beneficiaries. City and User and their successors and assigns are the only Parties to this Agreement and are the only Parties entitled to enforce its terms. Nothing in this Agreement gives, is intended to give, or shall be construed to give or provide, any benefit or right, whether directly or indirectly or otherwise, to third persons unless such third persons are individually identified by name herein and expressly described as intended beneficiaries of the terms of this Agreement.

16.16 Other Necessary Acts. Each Party shall execute and deliver to the other all such further instruments and documents as may be reasonably necessary to carry out this Agreement in order to provide and secure to the other Parties the full and complete enjoyment of rights and privileges hereunder.

16.17 Entire Agreement. This Agreement represents the entire agreement between the Parties relating to the subject matter hereof. This Agreement alone fully and completely expresses the agreement of the Parties relating to the subject matter hereof. There are no other courses of dealing, understanding, agreements, representations, or warranties, written or oral, except as set forth herein.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

USER:

Vitesse, LLC,
a Delaware limited liability company

By: _____

Name: _____

Its: _____

Date: _____

CITY:

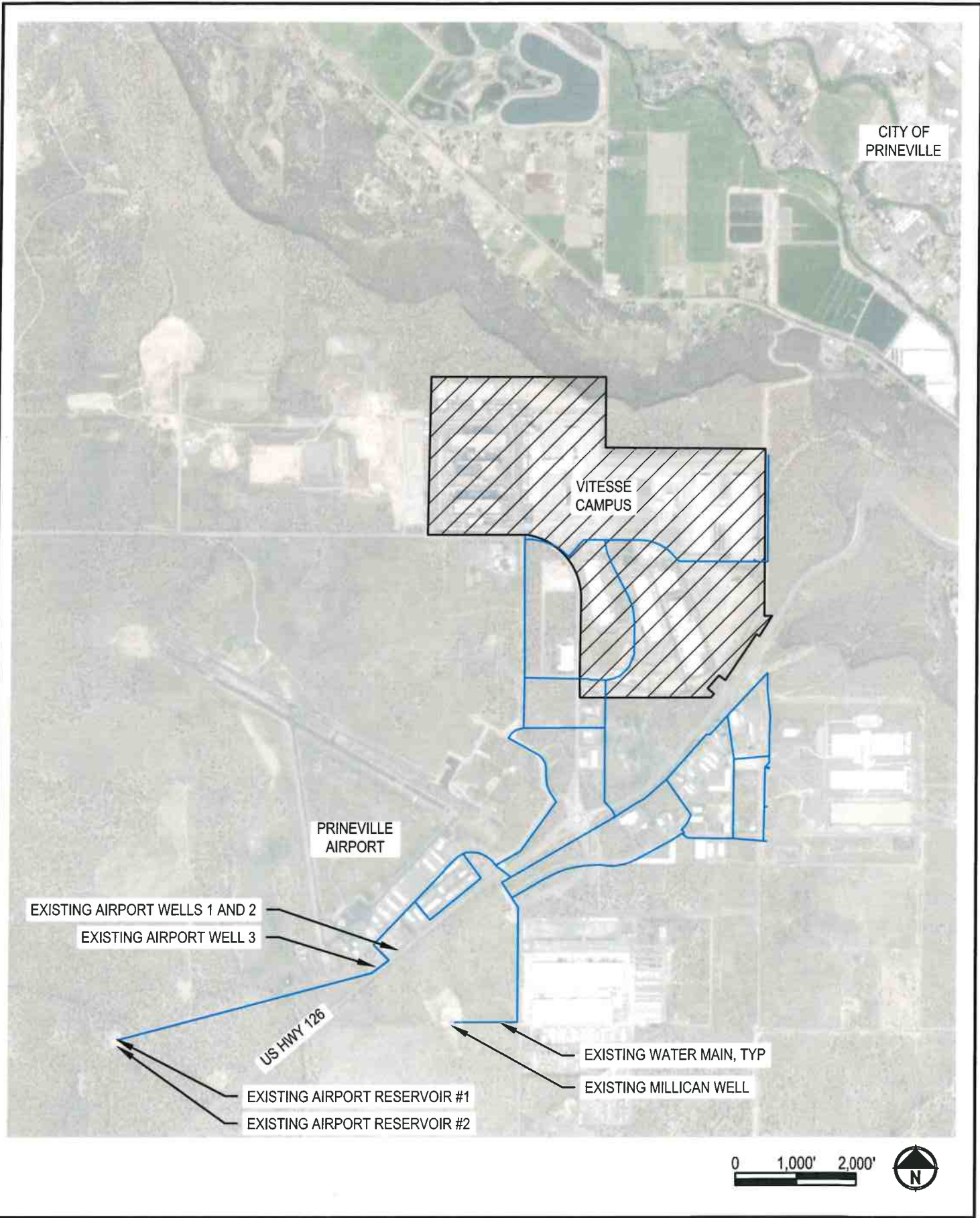
City of Prineville, Oregon,
an Oregon municipal corporation

By: Rodney J. Beebe

Name: Rodney J. Beebe

Its: Mayor

Date: April 12, 2022



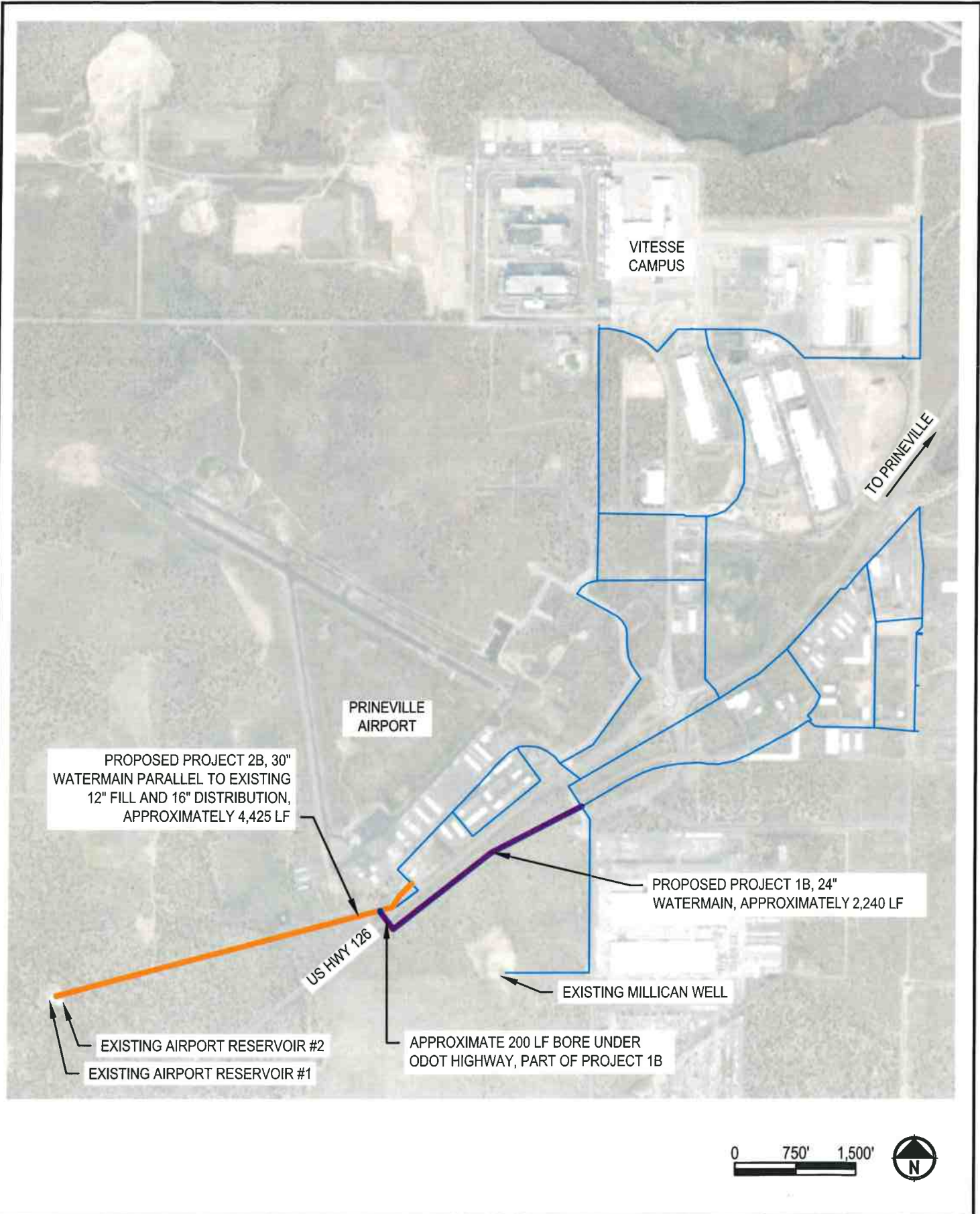


Table 6: Combined Estimated Range of Probable Project Costs for Resiliency Project #1 Improvements

Number	Sub-Project	-30% Construction Cost	Estimated Cost	+50% Construction Cost
1b	South 24"	\$2,230,000	\$3,180,000	\$4,770,000
2b	30" Parallel	\$3,640,000	\$5,190,000	\$7,790,000
R1a	Add'l 1.5MG Reservoir at Existing HGL	\$3,130,000	\$4,470,000	\$6,700,000
ASR 2+3	Combined ASR 2 & 3 cost	\$3,500,000	\$5,000,000	\$7,500,000
Total Resiliency Project #1 Estimated Cost		\$12,500,000	\$17,840,000	\$26,760,000