

MUTUAL BENEFIT AGREEMENT

Dated for reference this 28th day of September , 2018.

BETWEEN:

K'ÓMOKS FIRST NATION
3330 Comox Road
Courtenay, BC V9N 3P8

("K'ómoks First Nation" or "KFN")

OF THE FIRST PART

AND:

COMOX VALLEY REGIONAL DISTRICT
600 Comox Road
Courtenay, BC V9N 3P6

(the "Regional District")

OF THE SECOND PART

WHEREAS:

- A. K'ómoks First Nation has aboriginal rights and title in its traditional territory (the "Territory") in the Province of British Columbia. The UN Declaration on the Rights of Indigenous Peoples identifies fundamental principles for the use and ownership of natural resources, including water within the Territory.
- B. Under the authority of the *Local Government Act* and the Regional District's *Water Local Service Establishment Bylaw, 1995*, the Regional District operates a service known as the "Comox Valley Water Service" that supplies potable water in bulk to the City of Courtenay, the Town of Comox, various electoral area water distribution services, and the K'ómoks First Nation, and for that purpose holds licences under the *Water Sustainability Act* for the diversion and use of water from the Puntledge River.
- C. Under the provisions of the *Water Local Service Establishment Bylaw, 1995*, the Comox Valley Water Service is operated by a standing committee of the Regional Board, known as the Water Committee, which has, *inter alia*, the power to determine all policy related to the administration and operation of the Comox Valley Water Service.
- D. The Regional District is in the process of planning a project for the design and construction of new water treatment system that will draw current and additional water with capacity for 25 years of growth from Comox Lake, and will transport that

water to a new water treatment plant for filtration and disinfection (the “Comox Valley Water Treatment Project”).

- E. The Regional District is approaching the limit of its current water licence and requires additional licence capacity for access to water to meet the needs of its customers.
- F. The Regional District has an interest in constructing a water line to provide treated Comox Lake Water to the Royston Water Service Area.
- G. The K’ómoks First Nation has an interest in extending the Regional District water line to serve K’ómoks lands south of Royston (hereinafter referred to as the “K’ómoks South Lands” and more specifically defined in section 1.1(n)).
- H. Under the terms of an Agreement-in-Principle dated March 24, 2012 between the K’ómoks First Nation and the Governments of Canada and British Columbia, the Province of British Columbia has committed to establishing a water reservation over the Puntledge River and other watercourses in favour of the K’ómoks First Nation, under the *Water Sustainability Act*, effective on the date that a Final Agreement between the K’ómoks First Nation and the Governments of Canada and British Columbia comes into effect.
- I. Under an Impact Benefit Agreement between the K’ómoks First Nation and BC Hydro, K’ómoks First Nation has access to 5,000 cubic decameters of water from Comox Lake.
- J. The Regional District and the K’ómoks First Nation both wish to engage in cooperation and collaboration in the management of water resources in the region, including the extension of water services to the K’ómoks South Lands and greater participation by K’ómoks First Nation in the management of regional water resources.
- K. The Regional District has commissioned a study on Regional District utility governance, the terms of reference for which include:
 - (1) review of the existing governance of the Comox Valley Water Service;
 - (2) consultation with stakeholders including K’ómoks’ First Nation; and
 - (3) recommendations for changes to the governance structure of Regional District Utilities, including the governance structure of the Comox Valley Water Service.
- L. K’ómoks First Nation is a “public authority” within the meaning of the *Local Government Act* and *Community Charter*.
- M. Pursuant to section 263 of the *Local Government Act*, the Regional District has the authority to make agreements with a public authority respecting activities, works

and services within the powers of a party to the agreement, including the undertaking, provision and operation of activities, works and services.

- N. The Regional District and K'ómoks First Nation wish to confirm in this Agreement their agreements concerning:
- (1) K'ómoks First Nation support for and participation in the Comox Valley Water Treatment Project and the Water Service (South) Extension Project (as defined herein);
 - (2) K'ómoks First Nation support for a water licence application to be made by the Regional District;
 - (3) The supply of water in bulk by the Regional District to the K'ómoks First Nation for the development and servicing of the K'ómoks South Lands (as defined herein);
 - (4) K'ómoks First Nation future participation in management of regional water resources including its participation in the governance structure of the Comox Valley Water Service (as defined herein).

NOW THEREFORE in consideration of the mutual covenants and agreements contained in this Agreement, the parties agree as follows:

1.0 DEFINITIONS

1.1 In this Agreement the following terms shall have the following meanings:

- (a) **"Agreement"** or **"Mutual Benefit Agreement"** means this Agreement and its Schedules;
- (b) **"Comox Valley Water Service"** means the bulk water service established and operated by the Regional District under the authority of the Regional District's *Water Local Service Establishment Bylaw, 1995*;
- (c) **"Comox Valley Water Supply System"** means the bulk water collection, water treatment and transmission system, including water mains and pipes, pumps and other facilities and equipment owned or under the control of the Regional District through the Comox Valley Water Service and used for the supply of bulk water;
- (d) **"CICC's"** means capital improvement cost charges imposed by the Regional District as a condition of admission of lands to a service area for the purpose of assisting the Regional District in paying the capital costs of providing, constructing, altering or expanding the water infrastructure of the Comox Valley Water Service;

- (e) **“CICC Bylaw”** means the *Comox Valley Water Supply System Capital Improvement Cost Charge Bylaw No. 2350, 2001*, as amended or replaced from time to time;
- (f) **“DCC’s”** means development cost charges imposed by Regional District bylaw as a condition of the subdivision or development of land, for the purpose of assisting the Regional District in paying the capital costs of providing, constructing, altering or expanding the water infrastructure of the Comox Valley Water Service;
- (g) **“DCC Bylaw”** means the *Regional District of Comox-Strathcona Water Supply Development Cost Charges Bylaw 2001*, as amended or replaced from time to time;
- (h) **“Governance Study”** means the utility governance study being conducted on the Regional District’s behalf, as referred to in Recital K on page 2 of this Agreement;
- (i) **“Grant Applications”** means the grant applications for funding for the Comox Valley Water Treatment Project and Water Service (South) Extension Project, to be submitted by the Regional District to senior levels of government in accordance with section 2.1 of this Agreement;
- (j) **“KFN Southern Treaty Lands”** means those lands, intended to be serviced by the KFN Water System, presently within the Regional District, as generally outlined on the plan that is attached to this Agreement as Schedule “A” to this Agreement, that K’ómoks First Nation anticipates will be transferred to the K’ómoks First Nation by the Crown provincial through or as a result of K’ómoks First Nation treaty negotiations, and includes other lands that are added to the KFN Southern Treaty Lands through the KFN Treaty process (“Additional Treaty Lands”) that are contiguous to the lands outlined in Schedule “A”, or other lands that the Water Committee agrees are in sufficient proximity to the other K’ómoks South Lands that they may receive bulk water from the Regional District under the Water Supply Agreement without imposing any additional capital or operational burdens on the Comox Valley Water Service, and without the need for further amendment to the *Water Local Service Establishment Bylaw, 1995* or this Agreement;
- (k) **“KFN Water System”** means the works, services and facilities to be constructed, maintained and operated by the K’ómoks First Nation for the purpose of receiving bulk water from the Comox Valley Water Service System and redistributing that water within the K’ómoks South Lands, but for certainty does not include the Water Service (South) Extension Project;
- (l) **“K’ómoks Business”** means a business entity that is owned and controlled by the K’ómoks First Nation, or by one or more members of the K’ómoks First Nation;

- (m) **“K’ómoks Joint Venture”** means a joint venture between either the K’ómoks First Nation or a K’ómoks Business, and another business entity, in which the K’ómoks First Nation or K’ómoks Business has at least a 51% ownership interest;
- (n) **“K’ómoks South Lands”** means, collectively:
 - (i) the lands held in fee simple by or on behalf of K’ómoks First Nation as outlined on the plan that is attached to this Agreement as Schedule “A”; and
 - (ii) the KFN Southern Treaty Lands;
- (o) **“Parties”** when used in the plural means both parties to this Agreement, and when used in the singular means one of them;
- (p) **“Regional District”** means the Comox Valley Regional District and, where the context requires, means the Water Committee in the exercise of its delegated authority under the *Water Local Service Establishment Bylaw, 1995*;
- (q) **“Royston”** means the unincorporated area of the Regional District commonly referred to by that name;
- (r) **“Royston Water Service Area”** means the water service area operated by the Regional District within Royston under the authority of the Regional District’s *Royston Water Service Establishment Bylaw No. 126, 2010*;
- (s) **“Service Commencement Date”** means the date determined in accordance with section 4.1 of this Agreement, on which the Regional District will begin to supply water in bulk to the K’ómoks First Nation for the development and servicing of the K’ómoks South Lands;
- (t) **“Water Committee”** means the water committee constituted under the Regional District’s *Water Local Service Establishment Bylaw, 1995*;
- (u) **“Water Service (South) Extension Project”** means the extension and expansion of Comox Valley Water Supply System water mains and related infrastructure as may be necessary and desirable for the Comox Valley Water Service to provide bulk water service to:
 - (i) portions of the City of Courtenay;
 - (ii) the Royston Water Service Area;
 - (iii) K’ómoks South Lands ;
 - (iv) other lands or service areas within the boundaries of the Regional District that are south of the existing Comox Valley Water Service

transmission system, including lands that are located south of Royston;

which the Parties anticipate will be constructed in multiple phases, as generally shown on the plan that is attached to this Agreement as Schedule "B";

- (v) **"Water Service (South) Extension Project (Phase One)"** means the transmission main and other related water infrastructure forming part of the Water Service (South) Extension Project that will follow the "Phase One" alignment as shown generally on Schedule "B";
- (w) **"Water Supply Agreement"** means the Regional District's agreement to supply water in bulk to the K'ómoks First Nation for the development and servicing of the K'ómoks South Lands on the terms and conditions set out in Schedule "C" to this Agreement.

2.0 GRANT APPLICATIONS

- 2.1 The Regional District shall prepare grant applications to provincial and federal orders of government for funding for the Comox Valley Water Treatment Project and the Water Service (South) Extension Project (Phase One), and the Regional District with the K'ómoks First Nation as co-applicants shall submit the applications.
- 2.2 For certainty, the grant applications shall include requests for funding for the Water Service (South) Extension Project (Phase One), and shall identify the total cost of that project as at least \$14.8 million.
- 2.3 In the event that the Regional District receives grant funds in an amount less than that applied for, the Regional District will allocate the grant funds received to the Water Service (South) Extension Project (Phase One) and to the Comox Valley Water Treatment Project in a manner that is proportional to the budgeted value of each of those projects.
- 2.4 Notwithstanding that K'ómoks First Nation is listed as a co-applicant on grant communications and applications, all grant funding awarded pursuant to a grant application shall be payable solely to the Regional District, on behalf of both the Regional District and the K'ómoks First Nation, for the purpose of the Comox Valley Water Treatment Project and the Water Service (South) Extension Project (Phase One).
- 2.5 The Regional District, through the Water Committee, shall retain full control over all aspects of the design and construction of the Comox Valley Water Treatment Project and the Water Service (South) Extension Project (Phase One), including without limitation:
 - (a) design and specifications for both projects;

- (b) project budgets;
- (c) procurement and award of contracts; and
- (d) timing of the commencement of construction;

however the Regional District shall consult and work closely with the K'ómoks First Nation as to those aspects of the foregoing that affect the provision of bulk water service to the K'ómoks South Lands.

3.0 EXTENSION OF INFRASTRUCTURE FOR SUPPLY OF WATER TO K'ÓMOKS SOUTH LANDS

- 3.1 The Water Service (South) Extension Project (Phase One) will include a new transmission main that extends south from the existing Comox Valley Water System transmission system to a point where a connection to the KFN Water System may be established (the "Point of Connection"). The Parties will work cooperatively to determine the Point of Connection, but in the event the Parties cannot reach an agreement, the Water Committee will determine the Point of Connection.
- 3.2 The Regional District will initiate construction of the Water Service (South) Extension Project (Phase One) once all necessary funding has been secured. The Parties agree that all costs required for the design and construction of the Water Service (South) Extension Project (Phase One), after utilization of available grant funding, shall be funded by water service providers and where applicable developers that will benefit from the Water Service (South) Extension Project (Phase One). The Parties acknowledge that the implementation of this provision will be conditional upon the Regional District's ability to negotiate and enter into funding agreements with the K'ómoks First Nation, other water service providers and where applicable developers contributing to the Water Service (South) Extension Project (Phase One), which agreements may include provision for the recovery of costs through latecomer arrangements as referred to in section 3.3, and through development cost charge front-ender agreements and phased development agreements with developers, as applicable.
- 3.3 The Regional District agrees that funding agreements negotiated pursuant to section 3.2 may include provisions under which the Regional District shall make reasonable efforts to recover, by means of a "latecomer" arrangement, a financial contribution towards the costs paid by K'ómoks First Nation, and other contributing partners under section 3.2 of this Agreement (collectively, the "Contributors"), from water service providers and developers ("Latecomers") that make application to connect to and use the Water Service (South) Extension Project (Phase One) following the completion of construction, and who have not otherwise contributed, directly or indirectly, towards the costs of construction. The amount of the financial contributions collected from Latecomers shall be determined in a manner that is consistent with the determination of latecomer charges under section 508 of the *Local Government Act*, and shall also be distributed to Contributors in a manner that is consistent with that

legislation. For certainty, the “latecomer” arrangements contemplated under this section 3.3 may include the imposition of latecomer charges under section 508 of the *Local Government Act*, where that legislation applies, and may also include negotiated arrangements for financial contributions from Latecomers in cases where a Contributor was not subject to a requirement for excess and extended services under section 507 of the *Local Government Act*.

- 3.4 The Regional District shall work with water service providers and developers who require and will benefit from the construction of subsequent phases of the Water Service (South) Extension Project, including K’ómoks First Nation as applicable, to assist in developing strategies to fund further extensions or expansions of the Comox Valley Water Service’s transmission mains and related infrastructure, without imposing undue constraints on the development of the K’ómoks South Lands or other lands to be serviced by that infrastructure. For certainty, nothing in this Agreement shall obligate the K’ómoks First Nation to contribute financially to the construction of any further extension, expansion or phase of the Water Service (South) Extension Project that does not provide service directly or indirectly to the K’ómoks South Lands and to which the K’ómoks First Nation does not consent.
- 3.5 For certainty, nothing in this Agreement shall obligate the Regional District to contribute any funds towards the design and construction of the Water Service (South) Extension Project (Phase One) (other than the grant moneys received in response to the grant applications referred to in section 2.1), or to contribute any funds towards any future extensions, expansions or phases of the Water Service (South) Extension Project as referred to in section 3.4.

4.0 BULK WATER SUPPLY TO K’ÓMOKS SOUTH LANDS

- 4.1 Once the following conditions have been fulfilled, K’ómoks First Nation may provide notice in writing to the Regional District requesting the commencement of the supply of water in bulk from the Comox Valley Water Supply System to the KFN Water System:

- (a) the Water Service (South) Extension Project (Phase One) has been completed to the satisfaction of the Regional District;
- (b) K’ómoks First Nation has completed construction of all works and facilities necessary to establish a connection between the Comox Valley Water Supply System and the KFN Water System, on the terms and conditions set out in the Water Supply Agreement.

- 4.2 As of the Service Commencement Date, the Regional District will supply water in bulk to the K’ómoks First Nation for the development and servicing of the K’ómoks South Lands on the terms and conditions set out in Schedule “C”, attached to and forming part of this Agreement.

5.0 WATER LICENCE MATTERS

- 5.1 K'ómoks First Nation agrees to support the Regional District's application under the *Water Sustainability Act* for a water licence authorizing the diversion and use for local government waterworks purposes of up to 5,000 cubic decameters of water per year in Comox Lake.
- 5.2 The licence application referred to in section 5.1 shall specify that of the total of 5,000 cubic decameters of water authorized under the licence:
 - (a) 3,000 cubic decameters shall be for the use and benefit of the Regional District, for the supply of bulk water to lands other than the K'ómoks South Lands; and
 - (b) 2,000 cubic decameters shall be for the use and benefit of K'ómoks First Nation, for the supply of water to the K'ómoks South Lands.
- 5.3 Subsequent to the issuance of the water licence referred to in section 5.1 and at the request of K'ómoks First Nation, the Parties will make application to the Province under the *Water Sustainability Act* for apportionment of the rights under the Regional District water licence such that the 2,000 cubic decameters referred to in section 5.2(b) of this Agreement are apportioned to the K'ómoks First Nation for the use and benefit of the K'ómoks South Lands. The Parties anticipate that this application will be made after KFN Southern Treaty Lands are transferred to the K'ómoks First Nation.
- 5.4 The amount of water to be allocated to K'ómoks First Nation under the water licence application referred to in section 5.1 of this Agreement will be 2,000 of the 5,000 cubic decameters of water that BC Hydro has allocated to K'ómoks First Nation pursuant to the Impact Benefit Agreement negotiated between K'ómoks First Nation and BC Hydro. K'ómoks First Nation will take all necessary steps to seek B.C. Hydro's agreement to the use of that 2,000 cubic decameters of water for the purpose of the Regional District's water licence application.
- 5.5 The Regional District, through the Comox Valley Water Service, will pay the volumetric fee for lost generating capacity charged by BC Hydro for all water treated by and conveyed through the Comox Valley Water Supply System, including the water that is supplied to K'ómoks First Nation under this Agreement, in acknowledgement of the fact that those costs will be recovered through the bulk water rate charged to all users of the Comox Valley Water Supply System, including K'ómoks First Nation.

6.0 GOVERNANCE – MANAGEMENT OF REGIONAL WATER RESOURCES

- 6.1 The Parties agree to work towards defining the role of the K'ómoks First Nation in the management of regional water resources, by means of the process outlined in sections 6.2 to 6.4 of this Agreement.
- 6.2 The Regional District has commissioned a study on Regional District utility governance, the terms of reference for which include:

- (a) review of the existing governance of the Comox Valley Water Service;
 - (b) consultation with stakeholders including K'ómoks First Nation;
 - (c) recommendations for changes to the governance structure of Regional District Utilities, including the governance structure of the Comox Valley Water Service.
- 6.3 Pending the Regional District's receipt of the governance study report, K'ómoks First Nation may continue to attend and participate in meetings of the Water Committee as a non-voting member.
- 6.4 Following the Water Committee's review and consideration of the governance study, the Parties will engage in further discussions concerning the future decision making role of the K'ómoks First Nation in the management of regional water resources, which may include K'ómoks First Nation membership on the Water Committee as a voting member. The Parties agree that their discussion of any long-term governance model for the management of regional water resources will be based on the following:
- a) the results of the governance study;
 - b) K'ómoks Aboriginal rights and title;
 - c) the volume of water that each Party contributes to the Comox Valley Water Service;
 - d) appropriate measures to avoid conflicts of interest, including recusal of K'ómoks First Nation representatives from meetings of the Water Committee where the K'ómoks First Nation representatives have a conflict of interest;
 - e) water consumption requirements of each participant in the Comox Valley Water Service;
 - f) investment of the Parties in the upgraded Comox Valley Water Service water system;; and
 - g) consideration of any amendments to provincial legislation, the *Water Local Service Establishment Bylaw, 1995*, or any other enactment, that may be required to implement the proposed governance model.
- 6.5 The Parties will considerconsider the extension of water service to additional areas, including but not limited to K'ómoks Treaty Lands in the Piercy Road area, K'ómoks Treaty Lands in the Williams Beach Area and further phases, expansion or extensions of the Water Service (South) Extension Project. For greater certainty:

- (a) this does not commit either Party to a particular course of action or otherwise fetter or limit the discretion of either Party in relation to policy or financial decisions, or decisions of a legislative nature;;
- (b) extension of water service to additional areas may be subject to amendments to the *Water Local Service Establishment Bylaw, 1995* in accordance with applicable enactments, and to mutually satisfactory amendments to this Agreement and to the Water Supply Agreement.

7.0 KFN BUSINESS OPPORTUNITIES – CONSTRUCTION OF WATER TREATMENT PROJECT AND SOUTH SERVICE EXTENSION

7.1 The obligations of the Regional District under sections 7.2 to 7.4 are subject to the requirements of its procurement bylaws and its obligations under provincial and federal government trade treaties.

7.2 The Regional District will provide up to \$10,000,000.00 in direct contract awards related to the construction of the Water Service (South) Extension Project (Phase One) to qualified K'ómoks Businesses and K'ómoks Joint Ventures, provided that the prices offered by the qualified K'ómoks Businesses or K'ómoks Joint Ventures are commercially competitive.

7.3 For the purposes of section 7.2 of this Agreement:

- (a) “commercially competitive” means that the cost of the service is no greater than the Regional District would expect to pay for a similar service that is procured through a competitive process;
- (b) “qualified” means that the K'ómoks Business or K'ómoks Joint Venture, as the case may be, demonstrates to the Regional District's satisfaction that they have the qualifications, experience and financial and other resources necessary to provide the service to a standard that is consistent with provincial drinking water enactments and Regional District bylaws that impose standards in relation to water works and services.

7.4 In connection with the design and construction of the Comox Valley Water Treatment Project, the Regional District will:

- (a) work with K'ómoks First Nation to establish an inventory of K'ómoks Businesses highlighting applicable skills and resources, which the Regional District will make available to short-listed proponents;
- (b) require short-listed proponents to develop and include in their proposals a plan to provide subcontract opportunities to K'ómoks Businesses in connection with the project (a “KFN Subcontract Opportunity Plan”);

- (c) as part of evaluating and selecting the most advantageous proposal, consider the proposed KFN Subcontract Opportunity Plans and other relevant factors;
- (d) include the successful proponent's KFN Subcontract Opportunity Plan as part of the design-build contract and require the design-builder to:
 - (i) comply with all terms of its KFN Subcontract Opportunity Plan, and in addition, use reasonable efforts to provide K'ómoks Businesses with opportunities to participate in subcontract procurement processes for services, work, products or materials where the design-builder is soliciting bids or proposals and where K'ómoks Businesses have relevant experience or expertise; and
 - (ii) report to the Regional District and the K'ómoks First Nation quarterly on its compliance with the plan and on all opportunities provided to K'ómoks Businesses.

7.5 K'ómoks First Nation will ensure that K'ómoks Businesses are prepared to work with any design-build proponent selected by the Regional District. K'ómoks First Nation businesses will not enter into any agreements, joint ventures or other business relationships that give any participant or potential participant in the design-build procurement process the exclusive right to work with K'ómoks Businesses, in order to ensure that all participants in the design-build procurement process have a fair and equal opportunity to fulfill the business opportunities requirements of the design-build contract.

8.0 K'ÓMOKS SUPPORT LETTERS

8.1 K'ómoks First Nation will provide the Regional District with letters of support the Regional District requires for the Comox Valley Water Treatment Project and Water Service (South) Extension Project (Phase One), including but not limited to letters of support for any necessary permits or rights of way required for those projects, and letters of support for any new water lines and any necessary appurtenances required to facilitate construction, all to be provided within 10 business days of the execution of this Agreement. The letters of support will be in a form that are reasonably required by the Regional District to secure any necessary permits and approvals for those projects. Without limiting the foregoing, letters of support will be provided for applications for the water licence application referred to in Section 5.0 of this Agreement, as well as other applications to the Ministry of Forests, Lands, Natural Resource Operations and Rural Development, the Ministry of Municipal Affairs and Housing and to B.C. Hydro.

9.0 LEGISLATIVE DECISIONS AND THIRD PARTY APPROVALS

9.1 The Parties both agree and acknowledge that the implementation of certain aspects of this Mutual Benefit Agreement depend on the exercise of the legislative functions of the Parties which cannot be fettered by agreement, and also depend

on decisions of third parties including BC Hydro and the Provincial and Federal governments which are beyond the control of the Parties. Accordingly, the Parties agree that if any of the following are not obtained or concluded within a reasonable time (having regard to the complexity of the matter) following the execution of this Agreement, or in the case of sub-paragraphs (a) and (g) by the date specified in those sub-paragraphs, and without invalidating any decisions or actions that have been taken by a Party under this Agreement to that point, they will attempt in good faith to negotiate such changes or amendments to this Agreement as may be necessary to achieve the intention of the Parties:

- (a) approval of grant applications to provincial and federal orders of government for the Comox Valley Water Treatment Project in the amount of at least Fifty-Five Million Dollars, by December 31, 2019;
- (b) approval of grant applications to provincial and federal orders of government for the Water Service (South) Extension Project (Phase One);
- (c) securement of all other funding required for the Comox Valley Water Treatment Project and Water Service (South) Extension Project (Phase One);
- (d) BC Hydro's support for the water licence application referred to in section 5.1 of this Agreement;
- (e) BC Hydro's agreement to the use of 2,000 cubic decameters of water that BC Hydro has allocated to K'ómoks First Nation under the Impact Benefit Agreement for the purpose of the Regional District's water licence application, as referred to in section 5.4 of this Agreement;
- (f) if required to implement this Agreement, BC Hydro's agreement to amend the BC Hydro/K'ómoks First Nation Impacts Benefit Agreement to accommodate the requirements of this Agreement;
- (g) provincial approval of the Regional District water licence application referred to in section 5.1, on or before June 30, 2021;
- (h) provincial approval to apportion the water licence referred to in section 5.1 of this Agreement into a separate water licence to K'ómoks First Nation for the 2,000 cubic decameters referred to in section 5.2(b) of this Agreement, as referred to in section 5.3 of this Agreement;
- (i) any necessary amendments to the terms of CVRD's Bylaw No. 1783 in relation to the governance structure of the Water Committee;
- (j) all necessary approvals, including electoral approval, and all necessary bylaw amendments being approved for the supply of water in bulk by the Comox Valley Water Service;

- (k) in relation to future expansions, extensions or phases of the Water Service (South) Extension Project as contemplated under section 3.4, the approval of the Water Committee and any necessary amendments to the terms of CVRD's Bylaw No. 1783;
- (l) if required to implement this Agreement, conclusion of K'ómoks First Nation's treaty negotiations and transfer of KFN Treaty Lands to K'ómoks First Nation.

9.2 In the event that one or more of the approvals or matters referred to in section 9.1 are not obtained or concluded within a reasonable time following the execution of this Agreement, or in the case of sub-sections 9.1(a) and (g) by the date specified, and if as a result either Party is prevented from performing their remaining obligations under this Agreement, and if the Parties are unable to agree upon any necessary changes or amendments to this Agreement, then, subject to section 9.3, either Party may provide the other with written notice of termination of this Agreement.

9.3 A Party in receipt of a notice of termination under section 9.2 may refer the matter to dispute resolution under Part 10.

9.4 Termination of this Agreement may result in the revocation of the support letters referred to in section 8.1.

10.0 DISPUTES

10.1 If there is a dispute in respect of this Agreement between the Regional District and K'ómoks First Nation the dispute will be resolved as set forth in this Part.

10.2 The Parties will make all reasonable efforts to resolve any dispute that arises under this Agreement by amicable discussions and negotiations before resorting to the dispute resolution processes referred to in sections 10.4 to 10.7, and shall provide timely disclosure of all relevant and facts, information and documents to facilitate those discussions and negotiations.

10.3 If the Parties disagree as to the interpretation of this Agreement, or as to their respective rights or obligations under this Agreement, and if they are unable to resolve the disagreement within a reasonable time by the informal discussions and negotiations contemplated under section 10.2, they will resolve the dispute by following the steps outlined in sections 10.4 to 10.7.

10.4 Negotiation:

- (a) A Party that wishes a dispute to be resolved will give a written notice (the "Dispute Notice") to the other Party whereupon each Party will promptly designate a senior officer or senior representative and such designated officers and representatives will attempt in good faith to resolve the dispute

by negotiation. All reasonable requests for relevant information relating to the dispute made by a party will be honoured.

- (b) If the senior officers and senior representatives of the Parties are unable to resolve the dispute by negotiation under section 10.4(a), the representatives of the Parties shall each refer the dispute to (in the case of the Regional District's representatives) the Water Committee and to (in the case of the K'ómoks First Nation) the elected Council of the K'ómoks First Nation, for further direction as to the potential resolution of the dispute by negotiation.

10.5 Mediation:

- (a) If the parties are unable to resolve the dispute through negotiation within ninety (90) days of the date that the Dispute Notice was delivered as provided in section 10.4, either party may give notice to the other party requesting mediation of the dispute. Following such notice being given, the parties will jointly appoint a qualified and impartial individual with experience in local government and First Nations relations and service agreements (the "Mediator") to serve as a mediator in connection with the dispute. In the event the parties are unable to agree on the appointment of a Mediator, the Mediator will be appointed by the British Columbia International Commercial Arbitration Centre. The costs of mediation shall be borne equally by the Parties.
- (b) For certainty, the final report or recommendations of the Mediator shall not be binding on either Party.
- (c) If either or both Parties reject the final report or recommendations of the Mediator, then before resorting to binding dispute resolution by arbitration or litigation, the Chair of the Board and the Chief of the K'ómoks First Nation shall meet together to discuss the dispute and, if they both consider this advisable, may refer the dispute to the Water Committee and the elected Council of the K'ómoks First Nation for further discussion as to the potential resolution of the dispute.

10.6 Arbitration:

- (a) If a dispute is not resolved within one hundred and twenty (120) days after the appointment of the Mediator then either Party may deliver to the other Party a notice (an "Arbitration Notice") that the dispute is to be resolved by a single arbitrator (the "Arbitrator") pursuant to the *Arbitration Act (British Columbia)* under the Shorter Rules of Procedure of the British Columbia International Commercial Arbitration Centre.
- (b) If the dispute referred to in the Arbitration Notice is in relation to any of sections 6.1 through 6.4 of this Agreement, and the Party in receipt of an Arbitration Notice objects to the dispute being referred to arbitration, that Party may give written notice of its objection to the other Party, with reasons

for the objection, within thirty days of delivery of the Arbitration Notice, in which case the dispute shall not be determined through arbitration except by agreement of both Parties. In the absence of delivery of a written notice of objection under this section 10.6(b), both Parties shall be deemed to have agreed to refer the dispute to binding arbitration in accordance with this section 10.6.

- (c) The costs of the Arbitrator shall be borne equally by the Parties unless the Arbitrator determines otherwise.
- (d) The decision of the Arbitrator may be appealed to the Supreme Court of British Columbia on any question of law, and both Parties confirm that they have consented to an appeal on a question of law, in accordance with section 31(1)(a) of the *Arbitration Act*.

10.7 **Litigation** - If the Parties do not mutually agree to refer a dispute to binding arbitration, either party may initiate court proceedings to settle the dispute.

10.8 For greater certainty, if either Party refers a notice of termination under section 9.3 to dispute resolution, and if the dispute proceeds to binding arbitration or litigation, the arbitrator or court, as the case may be, shall not have the jurisdiction to order a change or amendment to this Agreement, but may:

- (a) determine whether one or both parties has been prevented from performing their obligations under this Agreement as a result of an approval or matter referred to in section 9.1 not being obtained or concluded;
- (b) set aside or confirm the notice of termination, on terms and conditions the court or arbitrator considers necessary and that are consistent with principles of law or equity that apply to this Agreement.

11.0 GENERAL PROVISIONS

11.1 Time

Time is of the essence of this Agreement and the transactions contemplated in this Agreement notwithstanding the extension of any of the dates under this Agreement.

11.2 Relationship of the Parties

No provision of this Agreement shall be construed as to create a partnership, joint venture relationship or a principal-agent relationship between the Parties.

11.3 Notices

- (a) Each notice sent pursuant to this Agreement ("**Notice**") shall be in writing and shall be sent to the applicable Party at the relevant address, facsimile number or e-mail address set out below. Each such Notice may be sent by

registered mail, by commercial courier, by facsimile transmission, or by electronic mail.

(b) The Contact Information for the parties is:

| | |
|--|--|
| K'ómoks First Nation Attention: | Comox Valley Regional District Attention: |
| 3330 Comox Road Courtenay, BC V9N 3P8 | 600 Comox Road Courtenay, BC V9N 3P6 |
| Tel: Fax: Email: | Tel: Fax: Email: |

- (c) Each Notice sent by electronic mail ("**E-Mail Notice**") must show the e-mail address of the sender, the name or e-mail address of the recipient, and the date and time of transmission, must be fully accessible by the recipient, and unless receipt is acknowledged, must be followed within twenty-four (24) hours by a true copy of such Notice, including all addressing and transmission details, delivered (including by commercial courier) or sent by facsimile transmission.
- (d) Subject to sections 11.3 through (e) through (h) each Notice shall be deemed to have been given or made at the following times:
- (i) if delivered to the address (including by commercial courier), on the day the Notice is delivered;
 - (ii) if sent by registered mail, seven (7) days following the date of such mailing by sender;
 - (iii) if sent by facsimile transmission, on the date the Notice is sent by facsimile transmission; or
 - (iv) if sent by electronic mail, on the date the E-Mail Notice is sent electronically by e-mail by the sender.
- (e) If a Notice is delivered, sent by facsimile transmission or sent by electronic mail after 4:00 p.m., or if the date of deemed receipt of a Notice falls upon a day that is not a Business Day, then the Notice shall be deemed to have been given or made on the next Business Day following.
- (f) Notice given by facsimile transmission in accordance with the terms of this Section 11.3 will only be deemed to be received by the recipient if the sender's facsimile machine generates written confirmation indicating that the facsimile transmission was sent.

- (g) If normal mail service, facsimile or electronic mail is interrupted by strike, slow down, force majeure or other cause beyond the control of the parties, then a Notice sent by the impaired means of communication will not be deemed to be received until actually received, and the party sending the Notice shall utilize any other such services which have not been so interrupted or shall personally deliver such Notice in order to ensure prompt receipt thereof.
- (h) Each Party shall provide Notice to the other Party of any change of address, facsimile number, or e-mail address of such Party within a reasonable time of such change.

11.4 Further Assurances

Each of the parties shall, at the expense of the other party, execute and deliver all such further documents and do such further acts and things as the other party may reasonably request from time to time to give full effect to this Agreement

11.5 Assignment

Neither Party may assign its rights under this Agreement without the prior written consent of the other Party.

11.6 Binding Effect

This Agreement shall enure to the benefit of and be binding upon the parties, their respective heirs, executors, administrators, and other legal representatives and, to the extent permitted in this Agreement, their respective successors and assigns.

11.7 No Derogation from Statutory Powers

Nothing in this Agreement shall be interpreted as prejudicing or impairing the Regional District in the exercise of any statutory legislative powers under the *Local Government Act*, the *Community Charter* or any other enactment all of which may be executed as if this Agreement had not been exercised.

Nothing in this Agreement shall be interpreted as not amending, abrogating or derogating from any Treaty or Aboriginal rights of K'ómoks First Nation which are recognized and affirmed by Section 35 (1) of the *Constitution Act, 1982*.

11.8 Extended Meanings

Words importing the singular number include the plural and vice versa, and words importing the masculine gender include the feminine and neuter genders.

11.9 Headings

The headings are for convenience of reference only and shall not affect the construction or interpretation of this Agreement.

11.10 Articles

For the purposes of this Agreement, except as otherwise expressly provided herein, all references in this Agreement to an article, section, subsection, paragraph, or other subdivision, or to a schedule, is to the article, section, subsection, paragraph or other subdivision of or schedule to this Agreement unless otherwise specifically stated.

11.11 Applicable Law

This Agreement shall be interpreted in accordance with the laws of British Columbia and Canada.

11.12 Waiver

Except as may be specifically agreed in writing, no action or failure to act by a party to this Agreement shall constitute a waiver of any right or duty afforded any of them under this Agreement nor shall any such action or failure to act constitute an approval of or acquiescence in any breach of this Agreement.

11.13 Entire Agreement

This Agreement constitutes the entire agreement between the parties with respect to the subject matter of the Agreement and contains all of the representations, warranties, covenants and agreements of the respective parties, and may not be amended or modified except by an instrument in writing executed by all parties. This Agreement supersedes all prior agreements, memoranda, and negotiations between the parties.

11.14 Schedules

The Schedules attached to this Agreement form part of this Agreement.

11.15 Counterpart

This Agreement may be executed in counterpart with the same effect as if both parties had signed the same document. Each counterpart shall be deemed to be an original. All counterparts shall be construed together and shall constitute one and the same Agreement.

IN WITNESS WHEREOF the parties have executed this Agreement.

SIGNED, SEALED AND DELIVERED)
on behalf of the **K'ÓMOKS FIRST NATION**)
pursuant to the consent of the majority)
of the Councillors present at a Council meeting)
duly convened at which)
authority was given for the)
K'ÓMOKS FIRST NATION)
to enter into this Agreement:)

M. Yung

Witness

3330 Comox Road

Address

Courtenay, BC V9N 3P8

Occupation

CEO

Occupation

[Signature]

Chief

Chief

Councillor

Councillor

Councillor

Councillor

COMOX VALLEY REGIONAL DISTRICT)
by its authorized signatory(ies):)

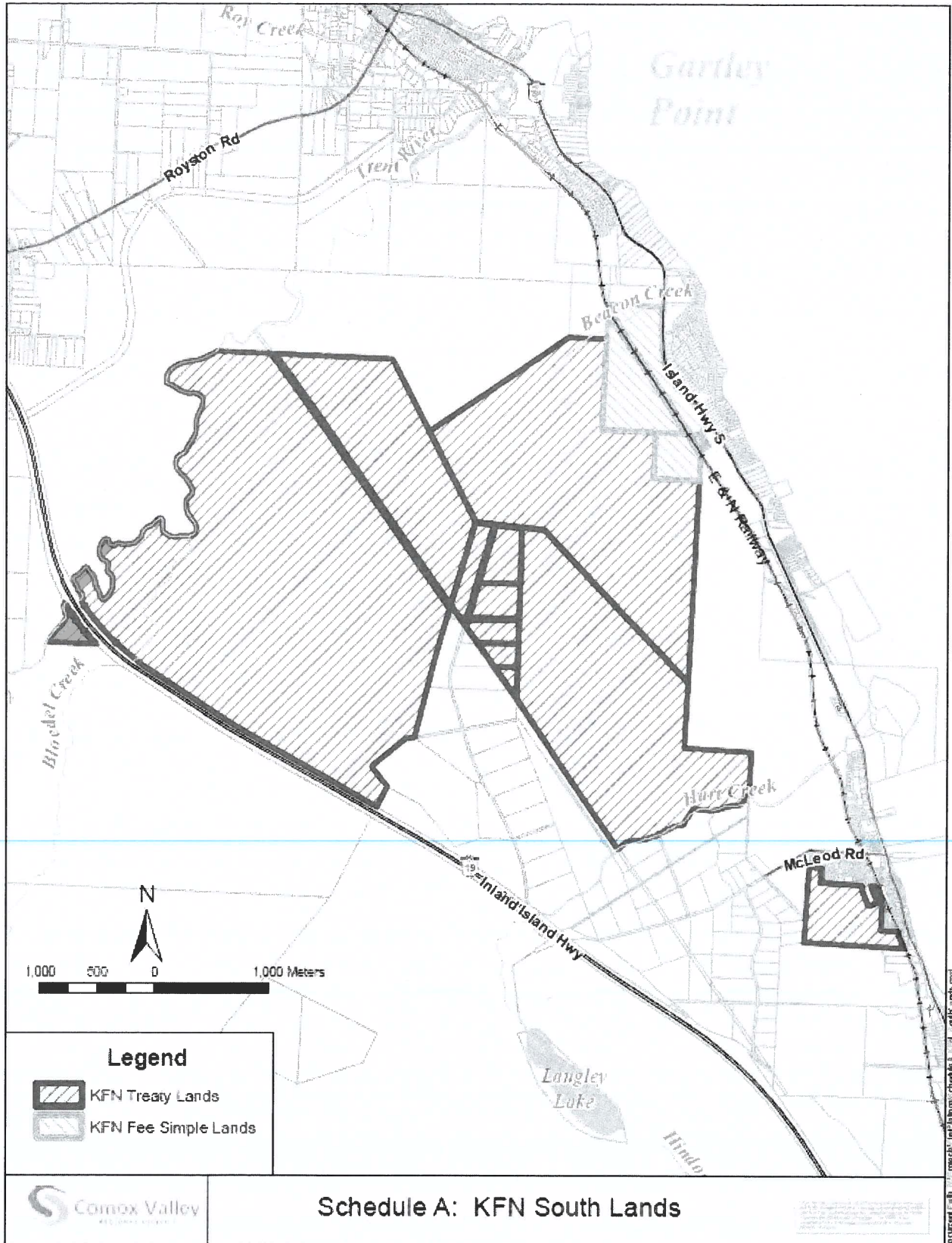
[Signature]

Chair

[Signature]

Deputy Corporate Legislative Officer

Schedule "A"



Date saved: 2018-09-13 10:54 AM

Schedule "C"

Terms and Conditions for Supply of Bulk Water to K'ómoks South Lands

1.0 Definitions

1.1 In this Schedule:

- (a) "Bulk Water Rates Bylaw" means *Comox Valley Water Supply System Bulk Water Rates Bylaw No. 2631, 2004*, as amended or replaced from time to time;
- (b) "Development" includes the subdivision of land and the construction of a building or other structure;
- (c) "Point of Connection" means the pipes, valves, backflow prevention devices, pressure reducing valves, water meters and other works which establish a connection between the Comox Valley Water Supply System and the KFN Water System;
- (d) "Regional District Specifications" means the engineering and construction standards and specifications utilized by the Regional District in the design and construction of works and facilities of the Comox Valley Water Supply System, or other technical standards that are otherwise acceptable to the Regional District, acting reasonably; and
- (e) "Service" means the bulk supply of treated water from the Comox Valley Water Supply System to the KFN Water System under this Water Supply Agreement.

2.0 Purchase and Sale of Bulk Water

- 2.1 As of the Service Commencement Date, K'ómoks First Nation will be entitled to receive, and the Regional District will make available, to the extent the transmission capacity of the Comox Valley Water Supply System allows, a supply of 2,000 cubic decameters of treated bulk water per year from the Comox Valley Water Supply System to the KFN Water System.
- 2.2 For greater certainty, the Regional District shall not be obliged under this Agreement to supply more than the 2,000 cubic decameters of bulk water annually referenced in section 5.2 (b) of the Mutual Benefit Agreement to the KFN Water System, and the supply of any additional water to the K'ómoks South Lands will be subject to the availability of supply and the water requirements of all customers of the Comox Valley Water Supply System including K'ómoks First Nation.
- 2.3 The K'ómoks First Nation and the Regional District both acknowledge that:

- (aa) the Water Service (South) Extension Project (Phase One) will not have sufficient capacity to supply 2,000 cubic decameters of bulk water annually to the K'ómoks South Lands; and
- (bb) the Regional District's ability to supply a total 2,000 cubic decameters of bulk water annually to the K'ómoks South Lands is conditional upon future expansions or extensions of the Water Service (South) Extension Project being completed as contemplated under section 3.4 of the Mutual Benefit Agreement.

3.0 Establishing a Point of Connection

- 3.1 K'ómoks First Nation must construct at its sole cost, in accordance with Regional District Specifications, any works required for the purpose of connecting the Comox Valley Water Supply System to the KFN Water System, whether such works are required to be constructed on or off the K'ómoks South Lands.
- 3.2 Before constructing any points of connection, K'ómoks First Nation must submit to the Regional District for its approval, detailed design drawings and specifications for the works, prepared by a Qualified Professional, and certified by that Qualified Professional to be in accordance with Regional District Specifications.
- 3.3 All work carried out by K'ómoks First Nation for the purpose of establishing a point of connection must be performed by qualified and experienced contractors that are acceptable to the Regional District, acting reasonably.
- 3.4 Each connection to the Comox Valley Water Supply System will become the property of the Regional District, upon certification by the Regional District that such works have been completed in accordance with Regional District Specifications.

4.0 Duration of Water Supply Agreement

- 4.1 This Water Supply Agreement shall remain in force following the Commencement Date, unless terminated by Agreement of the Parties.

5.0 Fees for Service

- 5.1 K'ómoks First Nation shall pay to the Regional District a fee for the supply of bulk water under this Water Supply Agreement that is:
 - (a) equivalent to the fee for the supply of bulk water payable by municipalities and Regional District water service areas under the Bulk Water Rates Bylaw;

- (b) payable at the times established under the Bulk Water Rates Bylaw for payment of bulk water fees by municipalities and Regional District water service areas.
- 5.2 The Regional District shall render invoices to the K'ómoks First Nation at the times established under the Bulk Water Rates Bylaw for invoicing municipalities and Regional District water service areas.
- 6.0 DCC's and CICC's**
- 6.1 The K'ómoks First Nation agrees that:
- (a) it shall pay DCC's and CICC's to the Regional District in respect of the K'ómoks South Lands and all development on the K'ómoks South Lands, using the DCC rates and CICC rates as set out in the DCC Bylaw and CICC Bylaw;
 - (b) that such payments shall be made whether or not, absent this Water Supply Agreement, the DCC Bylaw and CICC Bylaw would apply to the K'ómoks South Lands or any part of those lands.
- 6.2 CICC's shall be payable in respect of the lands held in fee simple by or on behalf of K'ómoks First Nation when the first Point of Connection is established under this Water Supply Agreement, and shall be payable in respect of the KFN Southern Treaty Lands when the K'ómoks First Nation acquires title to those lands.
- 6.3 For the purposes of determining the DCC's and CICC's payable under section 6.1, the DCC Bylaw and CICC Bylaw shall be used to classify portions of the K'ómoks South Lands that are subject to a DCC or CICC, and all developments on the K'ómoks South Lands that connect or are entitled to connect to the KFN Water System.
- 6.4 K'ómoks First Nation shall from time to time prepare a summary of developments on the K'ómoks South Lands that have been or are entitled to be connected to the KFN Water System and shall provide that summary to the Regional District according to a schedule that the parties agree to from time to time.
- 6.5 The summary provided under section 6.4 must be in such a form as to allow the Regional District to apply the rates payable under the DCC Bylaw and CICC Bylaw and determine the equivalent charges that are payable by K'ómoks First Nation. In the event that the K'ómoks First Nation does not provide a development summary as required under this Agreement, the Regional District may enter onto the K'ómoks South Lands for the purpose of determining the extent of all new development on the K'ómoks South Lands during the applicable period.
- 6.6 All DCC and CICC charges payable under this Water Supply Agreement shall be set out in an invoice prepared by the Regional District, following its receipt from K'ómoks First Nation, or the Regional District's preparation (whichever is

applicable) of the summary of developments on the K'ómoks South Lands. Each such invoice shall be payable by K'ómoks First Nation within sixty (60) days of its delivery to K'ómoks First Nation.

- 6.7 For certainty, K'ómoks First Nation shall not be required to pay DCC's in respect of a particular development in circumstances where an exemption under the DCC Bylaw or *Local Government Act* would apply, if that development occurred on other lands within the Regional District that are subject to the DCC Bylaw.

7.0 Standard of Service

- 7.1 The standard of service provided by the Regional District under this Water Supply Agreement, in terms of water quality and water pressure at each point of connection, will be substantially the same as the standard of service provided to municipalities and Regional District water service areas through the Comox Valley Water Supply System.

8.0 Interruptions in Service/Water Shortages

- 8.1 Without prejudice to any other right or remedy the Regional District may have, the Regional District may, in its sole discretion, and without terminating this Water Supply Agreement, interrupt or reduce the provision of service to the KFN Water System if the Regional District, acting reasonably, decides that interruption or reduction is necessary for public health, safety or for the conduct of routine maintenance or repairs.
- 8.2 Except in the case of an emergency, the Regional District shall provide at least 10 days written notice to the K'ómoks First Nation of any planned service interruption or reduction.
- 8.3 The Regional District, its elected and appointed officers and employees shall not be responsible to the K'ómoks First Nation for any losses or damage occurring as a result of interruptions or reductions in service caused by circumstances beyond their control, including losses or damage resulting from the inability to fight fires or carry on any activities on the K'ómoks South Lands due to insufficient supply of water, insufficient water pressure, or any other interruption or reduction in service. The K'ómoks First Nation agrees to indemnify and save harmless the Regional District from any and all actions, causes of action, claims, demands, losses and costs of any kind caused by or resulting from an insufficient supply of water, insufficient water pressure, or any other interruption or reduction in service under this section 8.3.
- 8.4 It is acknowledged that it is not possible for the Regional District to warrant a continual and consistent supply of water to the KFN Water System, as droughts or other conditions may impact the amount of water available to the Regional District to distribute to its customers. However, in the event of scarcity of supply, water shall be supplied to the KFN Water System on the same basis as water is supplied to other participants in the Comox Valley Water Service.

8.5 In the event that the regulatory bylaws for the Comox Valley Water Service do not apply to the K'ómoks South Lands or any portion thereof, the K'ómoks First Nation shall adopt and make all reasonable efforts to enforce bylaws governing the use of water that are consistent with the bylaws of the Regional District and other participants in the Comox Valley Water Service, that impose restrictions on use in times of diminished water supply.

9.0 Compliance with Laws and Regulations

9.1 The K'ómoks First Nation shall, in the use of the service, comply with all applicable bylaws of the Regional District related to the use by the K'ómoks First Nation of the bulk water service, whether or not such bylaws have legal force or effect on K'ómoks South Lands, and shall take all reasonable measures necessary to secure the compliance of all members of K'ómoks First Nation and all occupiers of the K'ómoks South Lands using the service with such restrictions and prohibitions, including enforcement of water use regulations that are consistent with Regional District and K'ómoks First Nation regulatory and enforcement policies.

10.0 Use of Water

10.1 Bulk water supplied to the KFN Water System shall be used by K'ómoks First Nation and occupants of the K'ómoks South Lands solely for domestic, commercial and industrial purposes on the K'ómoks South Lands, and for firefighting purposes, and shall not be re-distributed outside of the boundaries of the K'ómoks South Lands without the consent of the Regional District, not to be unreasonably withheld.

11.0 Default and Dispute Resolution

11.1 If either K'ómoks First Nation or the Regional District (the "Claiming Party") considers that the other party (the "Defaulting Party") is in breach of or has failed to perform any of the material covenants or obligations under this Water Supply Agreement, the Claiming Party may deliver written notice of that breach or non-performance to the Defaulting Party.

11.2 Upon receipt of a notice under section 11.1, the Defaulting Party must cure the breach or non-performance within sixty (60) days, or such other reasonable time as the parties agree to. If the Defaulting Party disputes that a breach or non-performance has occurred, the matter will be resolved under the dispute resolution provisions of Section 10.0 of the Mutual Benefit.

12.0 Indemnification

12.1 K'ómoks First Nation hereby releases and indemnifies the Regional District, its elected officials, officers, agents, contractors and employees from and against all manner of suits, claims, demands and causes of action arising out of or in connection with the provision of services under this Agreement including the

construction, operation, repairs and maintenance of such services, provided, however, that such release and indemnity shall not apply in any case where the Regional District, its elected officials, officers, agents, contractors, employees, invitees or other such parties for whom the Regional District is in law responsible have breached this Water Supply Agreement, been negligent, have behaved in a manner which amounts to willful misconduct, or have otherwise acted unlawfully.

- 12.2 The Regional District hereby releases and indemnifies K'ómoks First Nation, its elected officials, officers, contractors and employees from and against all manner of suits, claims, demands and causes of action arising out of or in connection with any breach of this Agreement on the part of the Regional District, its elected officials, officers, agents, contractors, employees and other such parties for whom the Regional District is in law responsible, and their negligence, misconduct or unlawful acts, provided, however, that such release and indemnity shall not apply in any case where K'ómoks First Nation, its elected officials, officers, agents, contractors, employees, invitees or other such parties have breached this Water Supply Agreement, been negligent, have behaved in a manner which amounts to willful misconduct, or have otherwise acted unlawfully.

13.0 Assignment

- 13.1 K'ómoks First Nation shall not assign its interest in this Water Supply Agreement without the prior written consent of the Regional District.

14.0 Treaty First Nation Membership in Regional District

- 14.1 In the event that the K'ómoks First Nation becomes a treaty first nation member of the Regional District, and is a participant in the Comox Valley Water Service, the terms and conditions of service under this Water Supply Agreement shall continue in force, but may be modified by agreement of the Parties as the circumstances require.