

K'ómoks Estuary Consent Agreement

This is a draft of the K'ómoks Estuary Consent Agreement intended as information for Ratification Purposes. British Columbia and K'ómoks recognize that further review—including legal and technical review—will need to occur. As a result, changes to this draft may be made prior to signing. British Columbia and K'ómoks agree that the K'ómoks Estuary Consent Agreement will be completed prior to the Effective Date of the K'ómoks Treaty.

Date Initialed: January 13, 2024

K'ómoks: 

British Columbia: 

K'ómoks Estuary Consent Agreement
Initialed Version

K'ómoks Estuary Consent Agreement

BETWEEN:

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, as represented by the Minister of Indigenous Relations and Reconciliation and the Minister of Water, Lands and Resource Stewardship

(the "Province")

AND:

K'ÓMOKS NATION, as represented by the K'ómoks Government

("K'ómoks")

(individually a "Party" and collectively the "Parties")

WHEREAS:

- A. K'ómoks, Canada and the Province have entered into the K'ómoks Treaty which recognizes K'ómoks aboriginal rights including aboriginal title and the inherent right to self-government.
- B. In recognition of such rights historically held by K'ómoks in the area referred to as the K'ómoks Estuary, the Parties wish to enter into a process of consent-based decision making in relation to the K'ómoks Estuary.
- C. In recognition of K'ómoks inherent right to self-government, Paragraph 17 of the Co-Management Chapter of the K'ómoks Treaty provides that the Province and K'ómoks will enter into a "K'ómoks Estuary Consent Agreement" relating to the exercise of certain statutory powers under the *Land Act* within the K'ómoks Estuary;

THEREFORE the Parties agree as follows:

1.0 DEFINITIONS AND INTERPRETATION

1.1 In this Agreement, the following definitions apply:

Agreement means this K'ómoks Estuary Consent Agreement, dated for reference [insert date], including all its parts and schedules, as amended from time to time in accordance with its terms;

Applicant means a person that applies for or holds, as the case may be, a Disposition within the K'ómoks Estuary;

Application means an application for a Disposition within the K'ómoks Estuary;

Business Day means a day, other than a Saturday or a Sunday, or a statutory holiday in the province of British Columbia;

Disposition means a lease, licence of occupation, easement or right of way granted under s. 11 (2), 38, 39 or 40 of the *Land Act*, further to an application made under s. 11 (1)(a) and s. 32 of the *Land Act*, but does not include the replacement or assignment of Existing Infrastructure Tenures.

Existing Infrastructure Tenures means the tenures shown on Appendix "B" and any replacements or assignments thereof;

K'ómoks Estuary means the area identified in paragraph 3.1;

K'ómoks Estuary Consent Team means the body established pursuant to section 3.2, comprised of:

- a. a Provincial Official;
- b. a K'ómoks Official; and
- c. other representatives as agreed to by the Parties;

K'ómoks Estuary Management Principles include:

- a. acknowledgment of K'ómoks aboriginal rights including aboriginal title and the inherent right to self-government;
- b. acknowledgment of K'ómoks Exercisable Section 35 Rights in the K'ómoks Estuary;
- c. protection of K'ómoks' cultural heritage, including the archaeological history, associated with the K'ómoks Estuary;
- d. promotion of ecosystem health and recovery within the K'ómoks Estuary;
- e. conservation of wildlife and fish health and their habitat; promotion of recreational uses;
- f. sustainable economic development while mitigating adverse impacts, if any, on a) through e); and
- g. other matters as agreed by the Parties;

K'ómoks Official means any elected official, public official, employee, contractor, agent or representative of K'ómoks or any person acting as a decision maker under any enactment of K'ómoks.

K'ómoks Treaty means the K'ómoks Treaty, dated for reference [insert date], among K'ómoks, Canada and British Columbia, including all schedules and appendices to that agreement and includes any amendments from time to time;

Provincial Official means:

- a. any minister, public official, employee, contractor, agent, or representative of the Province; or
- b. any person acting as a decision-maker under any enactment of the Province;

Review Package means the information to be provided to K'ómoks under section 3.4 and will include a copy of the Application and any additional relevant information;

Senior Officials Group means the body established under section 3.3 comprised of:

- a. the K'ómoks Chief Administrative Officer or their delegate; and
- b. Deputy Minister, or their delegate, of the appropriate Provincial ministry;

1.2 Words and expressions not defined in this agreement, but defined in the K'ómoks Treaty, have the meaning ascribed to them in the K'ómoks Treaty, unless the context otherwise requires.

1.3 In this Agreement:

- a. "will" denotes an obligation that, unless this Agreement provides to the contrary, must be carried out as soon as practicable after the event that gives rise to the obligation;
- b. "may" is to be construed as permissive, but the use of the words "may not" is to be construed as disempowering;
- c. "including" means "including, but not limited to";
- d. a reference to a "section" or "Appendix" means a section or appendix, respectively, of this Agreement;
- e. "or" is used in its inclusive sense, meaning A or B, or both A and B;
- f. "and" is used in its joint sense, meaning A and B, but not either alone;
- g. recitals, headings and subheadings are for convenience only, do not form a part of this Agreement and in no way define, limit, alter or enlarge the scope or meaning of any provision of this Agreement;

- h. a reference to a statute or a regulation includes every amendment to it, every regulation made under that statute, and any law enacted in substitution for it or in replacement of it;
 - i. the use of the singular includes the plural, and the use of the plural includes the singular;
 - j. where a word is defined in this Agreement other parts of speech and grammatical forms of the same word have corresponding meanings;
 - k. “consensus” in relation to a decision means the unanimous agreement of the members of the K'ómoks Estuary Consent Team;
 - l. in the calculation of time under this Agreement, if the time for doing an act falls or expires on a day that is not a Business Day, the time is extended to the next Business Day.
- 1.4 This Agreement will be interpreted and implemented in a manner that is consistent with the honour of the Crown.
- 1.5 The United Nations Declaration on the Rights of Indigenous Peoples is an authoritative source for the interpretation of this Agreement, and, accordingly, informs the Parties in their implementation of this Agreement.

2.0 SHARED PRINCIPLES

- 2.1 The Parties' work under this Agreement will be guided by the following principles:
- a. decision-making processes must respect and implement K'ómoks Exercisable Section 35 Rights;
 - b. decision-making processes must be premised on and advance the K'ómoks Estuary Management Principles;
 - c. decision-making processes must ensure that K'ómoks and the Province can make informed decisions in a manner that incorporates K'ómoks traditional knowledge;
 - d. decision-making processes must be predictable, transparent, and administratively fair and decision makers must be accountable for their decisions;
 - e. K'ómoks' and the Province's decision-making processes must be effective and coordinated; and,
 - f. respect for the government-to-government relationship between the Parties and a shared goal to reach consensus where possible.

3.0 CONSENT-BASED DECISION-MAKING PROCESS

- 3.1 The Parties will follow the decision-making process set out in this Agreement for all Applications within the K'ómoks Estuary as identified in Appendix "A".
- 3.2 For each Application, the Parties will determine the appropriate representatives of each Party to form part of the K'ómoks Estuary Consent Team which, for that Application, will be responsible for ensuring that:
 - a. meetings of the K'ómoks Estuary Consent Team, and other Provincial Officials and K'ómoks Officials as required, are held so that the responsibilities of the Parties under this Agreement are fulfilled;
 - b. efforts are made to achieve consensus on Applications as set out in this Agreement, by working together to seek solutions that meet the needs of the Parties; and,
 - c. K'ómoks and Provincial decision makers are supported in rendering timely decisions pursuant to Parts 5 and 6, respectively.
- 3.3 The Parties will establish a Senior Officials Group which will be responsible for:
 - a. supporting the K'ómoks Estuary Consent Team to achieve consensus on Applications, if requested pursuant to section 4.7; and,
 - b. supporting the implementation of this Agreement.
- 3.4 Upon receipt of an Application, the Province will prepare and provide K'ómoks a Review Package in relation to the Application and will advise the Applicant of the decision-making process required under this Agreement.

4.0 COLLABORATIVE REVIEW OF APPLICATION

- 4.1 No later than 40 Business Days after a Review Package is received by K'ómoks under paragraph 3.4, or as otherwise agreed by the Parties, the K'ómoks Estuary Consent Team will meet to discuss the Review Package and, with consideration for the K'ómoks Estuary Management Principles and the Shared Principles, will determine if the K'ómoks Estuary Consent Team is able to reach a consensus recommendation regarding the Application.
- 4.2 If the K'ómoks Estuary Consent Team determines it is not able to reach a consensus recommendation on the Application, the K'ómoks Estuary Consent Team will develop a list of concerns it may have with respect to the Application and determine whether any additional information is required to complete the assessment of the Application.
- 4.3 If the K'ómoks Estuary Consent Team determines that additional information is required, the K'ómoks Estuary Consent Team will establish the timeframe to obtain this information.

- 4.4 If the K'ómoks Estuary Consent Team determines, under Paragraph 4.2, that additional information is required, the K'ómoks Estuary Consent Team will, in seeking that information, provide a summary explaining why the information is being sought, which may include a summary of any initial concerns identified by the K'ómoks Estuary Consent Team.
- 4.5 If additional information is requested from K'ómoks or the Province under paragraph 4.3 and the Party is not able to provide the requested information within the timeframe, the relevant Party will provide written justification to the other Party.
- 4.6 At any point before a written decision is issued by K'ómoks under Part 5, either Party may request an additional meeting of the K'ómoks Estuary Consent Team to review the Application.
- 4.7 If a consensus recommendation cannot be reached by the K'ómoks Estuary Consent Team at the meeting held in accordance with paragraph 4.1 or 4.6, as applicable, at any point before a written decision is issued by K'ómoks, either Party may request the attendance of the Senior Officials Group at a K'ómoks Estuary Consent Team meeting to reach a consensus recommendation.
- 4.8 If, at any point, a consensus recommendation is reached by the K'ómoks Estuary Consent Team, the K'ómoks Estuary Consent Team will forward that consensus recommendation to the Parties for consideration in issuing their written decisions.
- 4.9 Within 5 Business Days of any meeting held under this Part, the Province will provide K'ómoks with a record of decision from the meeting.

5.0 K'ÓMOKS DECISION ON APPLICATION

- 5.1 Within 30 Business Days of the meeting described in 4.1, or as otherwise agreed to by the Parties, K'ómoks will provide the Province with a written decision respecting the Application, which will indicate whether K'ómoks:
 - a. consents to the Application and, if so, what terms and conditions, if any, need to be attached to the Disposition if it is issued; or
 - b. does not consent to the Application and the basis for their decision not to consent.
- 5.2 In completing the assessment and providing the Province with a written decision, K'ómoks must consider the Application's consistency with the K'ómoks Estuary Management Principles and the Shared Principles.
- 5.3 If requested by the Province, K'ómoks will provide documentation and the rationale supporting its written decision to the Province on the basis and understanding that such

material may be disclosed by the Province to the Applicant to support the making of the decision on the Application.

6.0 PROVINCIAL DECISION ON APPLICATION

- 6.1 Where K'ómoks consents to the Application under paragraph 5.1 (a), the Province will make a decision on whether to approve the Application, with consideration for provincial regulatory requirements and policy, K'ómoks Estuary Management Principles and the Shared Principles.
- 6.2 If the Province approves the Application, the Province will advise K'ómoks and the Applicant in writing of its decision and any terms or conditions that are attached to the Disposition.
- 6.3 Where K'ómoks consents to the Application on specified terms or conditions, the Province cannot issue the Disposition to the Applicant unless it is subject to similar terms or conditions, subject to the Province having jurisdiction and necessary approvals.
- 6.4 If the Province does not approve the Application when making a decision under Paragraph 6.1, the Province will advise K'ómoks and the Applicant in writing of its decision.
- 6.5 If requested by K'ómoks, the Province will provide documentation and the rationale supporting its decision to K'ómoks.
- 6.6 Where K'ómoks does not consent to the Application under paragraph 5.1 (b), the Province must refuse to issue the Disposition and will provide written reasons to the Applicant for its decision, including information provided by K'ómoks regarding the basis for its decision to not consent.
- 6.7 Where K'ómoks does not provide the Province with a written decision within the timeline established in paragraph 5.1, the Province may, following 30 days written notice provided to K'ómoks, make a decision on whether to approve the Application, with consideration for provincial regulatory requirements and policy, K'ómoks Estuary Management Principles and the Shared Principles and may issue, or refuse to issue, the Disposition.

7.0 ACCOUNTABILITIES IN JUDICIAL REVIEW PROCEEDINGS

- 7.1 If served with a petition that seeks judicial review of the Province's decision in respect of a Disposition, K'ómoks may file a response and affidavit evidence in the proceeding and will cooperate with the Province, to the extent possible without compromising its own legal position in the proceeding, to respond to the application for judicial review.
- 7.2 If a petition is brought to seek judicial review of the decision of the Province in respect of a Disposition, but K'ómoks is not served with the petition:

- a. K'ómoks will:

- i. file a motion in the BC Supreme Court and the Province will support that motion; or
- ii. support a motion by the Province in the BC Supreme Court;

to add K'ómoks as a respondent to the proceeding; and

- b. if K'ómoks is added as a respondent, K'ómoks will file a response and affidavit evidence in the proceeding and cooperate with the Province, to the extent possible without compromising its own legal position in the proceeding, to respond to the application for judicial review.

7.3 If a decision on the judicial review of the decision of the Province in respect of a Disposition is appealed by any party:

- a. if K'ómoks was a Party to the petition, and if K'ómoks and the Province both choose to participate in the appeal, K'ómoks and the Province will cooperate, to the extent possible without compromising their own legal positions in the proceeding, for the purposes of the appeal;
- b. if K'ómoks was not a Party to the petition, K'ómoks may seek to intervene in the appeal; and
- c. if granted intervener status, K'ómoks will cooperate with the Province, to the extent possible without compromising its own legal position in the proceeding, for the purposes of the appeal.

7.4 If served with a petition that seeks judicial review of the K'ómoks decision in respect of a Disposition, the Province may file a response and affidavit evidence in the proceeding and will cooperate with K'ómoks, to the extent possible without compromising its own legal position in the proceeding, to respond to the application for judicial review.

7.5 If a petition is brought to seek judicial review of the K'ómoks decision in respect of a Disposition, but the Province is not served with the petition:

- a. the Province will:
 - i. file a motion in the BC Supreme Court and K'ómoks will support that motion; or
 - ii. support a motion by K'ómoks in the BC Supreme Court,

to add the Province as a respondent to the proceeding;

- b. if the Province is added as a respondent, the Province will file a response and affidavit evidence in the proceeding and cooperate with K'ómoks, to the extent

possible without compromising its own legal position in the proceeding, to respond to the application for judicial review.

- 7.6 If a decision on the judicial review of the K'ómoks decision in respect of a Disposition is appealed by any party:
- a. if the Province was a party to the petition, and if the Province and K'ómoks both choose to participate in the appeal, the Province and K'ómoks will cooperate to the extent possible without compromising their own legal positions in the proceeding, for the purposes of the appeal;
 - b. if the Province was not a party to the petition, the Province may seek to intervene in the appeal; and
 - c. if granted intervener status, the Province will cooperate with K'ómoks, to the extent possible without compromising its own legal position in the proceeding, for the purposes of the appeal

8.0 K'ÓMOKS KNOWLEDGE AND CONFIDENTIAL INFORMATION

- 8.1 Notwithstanding section 5.3, the Parties will not share K'ómoks traditional knowledge that has been identified as confidential, unless otherwise agreed by K'ómoks or where such disclosure is required by law.
- 8.2 The Province acknowledges that the disclosure of confidential information to any other Party requesting such information under the *Freedom of Information and Protection of Privacy Act* could be reasonably expected to harm the relations between the Province and K'ómoks and that if the Province receives a request under the *Freedom of Information and Protection of Privacy Act* or is otherwise required by law to disclose confidential information, the Province will provide K'ómoks with notice of the request and the opportunity to express any views regarding the disclosure.

9.0 DISPUTE RESOLUTION AND TERMINATION

- 9.1 If any issue arises with respect to the interpretation, application or implementation of this Agreement as between the Parties, including a breach or anticipated breach of this Agreement, K'ómoks or the Province may initiate the Dispute Resolution procedures established in accordance with the Dispute Resolution Chapter of the K'ómoks Treaty to attempt to resolve the dispute.
- 9.2 If a dispute regarding a fundamental breach of this Agreement is not resolved following the completion of Stage Two of the Dispute Resolution Chapter, either Party may terminate this-Agreement upon 60 days written notice to the other Party.
- 9.3 This Agreement may be terminated by agreement of the Parties.

9.4 If this Agreement is terminated pursuant to this Part, Parts 7, 8 and 11 of this Agreement will survive the termination.

10.0 TERM AND AMENDMENT

10.1 The term of this Agreement will commence and this Agreement will take effect on the Effective Date of the K'ómoks Treaty.

10.2 This Agreement may be amended from time to time by agreement of the Parties in writing.

11.0 LEGAL RESPONSIBILITIES

11.1 The Province is not the agent of K'ómoks for any purpose related directly or indirectly to this Agreement.

11.2 K'ómoks is not the agent of the Province for any purpose related directly or indirectly to this Agreement.

11.3 The Province is not responsible or liable for the acts, omissions, negligence, malfeasance or misfeasance of K'ómoks, or any K'ómoks Official related directly or indirectly to this Agreement.

11.4 K'ómoks is not responsible or liable for the acts, omissions, negligence, malfeasance or misfeasance of the Province or any Provincial Official related directly or indirectly to this Agreement.

12.0 ABORIGINAL AND TREATY RIGHTS

12.1 The Parties agree that this Agreement does not constitute a treaty or land claims agreement within the meaning of sections 25 or 35 of the *Constitution Act, 1982*.

12.2 The Parties agree that the processes contemplated by this Agreement with respect to an Application constitute a Specific Consultation Process under paragraph 65 of the General Provisions Chapter of the K'ómoks Treaty in respect of that Application.

12.3 For greater certainty, this Agreement does not in any way affect or limit any consultation or constitutional obligations that the Province may owe to other Aboriginal People in relation to an Application.

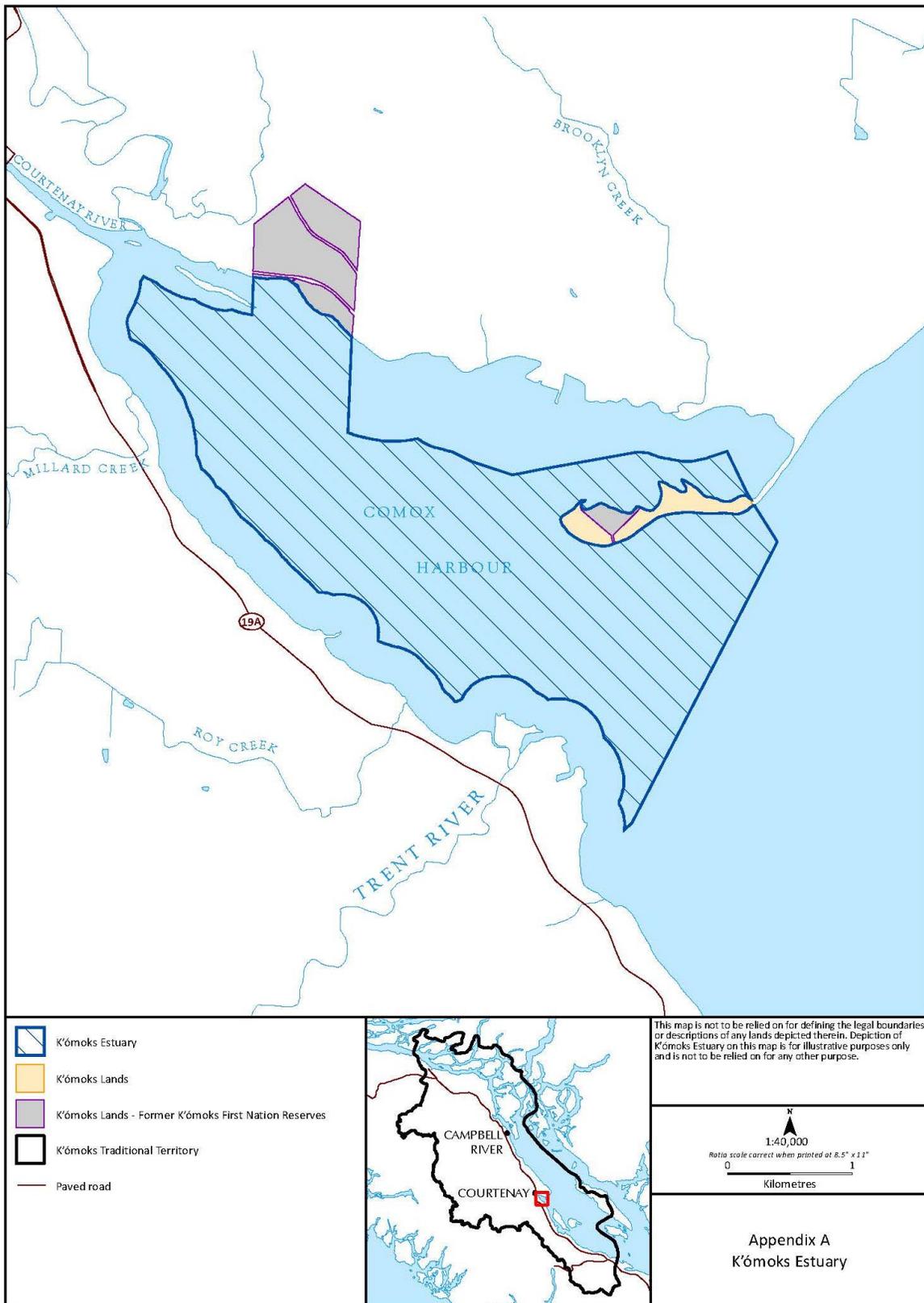
13.0 GENERAL

13.1 Any waiver of:

- a. a provision of this Agreement;
- b. the performance by a Party of an obligation under this Agreement; or

- c. a default by a Party of an obligation under this Agreement,
will be in writing and signed by the Party or Parties giving the waiver and will not be a waiver of any other provision, obligation or subsequent default.
- 13.2 If any part of this Agreement is declared or held invalid for any reason, the invalidity of that part will not affect the validity of the remainder which will continue in full force and effect and be construed as if this Agreement had been executed without the invalid part.
- 13.3 Unless otherwise agreed to by the Parties, this Agreement may not be assigned, either in whole or in part, by any Party.
- 13.4 This Agreement will enure to the benefit of and be binding upon the Parties and their respective permitted assigns.
- 13.5 Except as otherwise set out in this Agreement, any notice, document, request in writing or communication required or permitted to be given under this Agreement shall be in writing and delivered by email, mail, or facsimile to the Party to which it is to be given as follows:
- To the Province: [insert contact info]
- To K'ómoks: [insert contact info]
- or to such other address in Canada as either Party may advise in writing.
- 13.6 Any notice, document or communication will be deemed to have been given on the Business Day when delivered or when transmitted with confirmation of transmission by facsimile, if done so during or before normal business hours in location of the address.
- 13.7 This Agreement will be governed by and construed and interpreted in accordance with the laws of the Province of British Columbia.
- 13.8 Time is of the essence in this Agreement.

APPENDIX A: K'ómoks Estuary



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APPENDIX B: Existing Infrastructure Tenures

File No	Document No.	Interest Holder	Tenure Purpose	Expiry Date	Tenure Type
0239216	105424	COMOX VALLEY REGIONAL DISTRICT	SEWER/EFFLUENT LINE	9999-May-13	STATUTORY RIGHT OF WAY (OR EASEMENT)
1402163	112278	COMOX VALLEY REGIONAL DISTRICT	SEWER/EFFLUENT LINE	2066-Aug-01	STATUTORY RIGHT OF WAY (OR EASEMENT)
1409688	V937324	MANATEE HOLDINGS LTD.	WATER LINE	2031-Mar-01	LICENCE OF OCCUPATION