LAKE COUNTRY
Life. The Okanagan Way.

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Water Sustainability Act
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To whom it may concern:

RE: Comments on the proposed new *Water Sustainability Act*

I submit comments in relation to the proposed new *Water Sustainability Act* on behalf of the District of Lake Country.

By way of background, the District of Lake Country holds storage and diversion licences in the Okanagan area for domestic, waterworks and irrigation uses. The District supplies water to irrigators and commercial, domestic and recreational users. For many years, the Province has encouraged B.C. water purveyors to build and maintain infrastructure to store enough water to sustain three years of consecutive drought. The District currently has enough storage to protect against two years of consecutive drought, and is taking steps to increase this storage to allow sustainability for three years of consecutive drought.

The Okanagan is semi-arid and water is a valued asset. Local irrigators require a reliable supply of water at a reasonable cost to allow them to compete in a global market and to ensure that their investment in their crops is not lost during drought years. In-stream flows are critical throughout the watersheds to support resident fish and the in-stream ecosystems that support fish. Low stream flows and high water temperatures can make the water quality unsuitable for fish habitation. The release of sufficient water from the reservoirs must be available for different life stages of key fish species in the watershed. Kokanee and Rainbow trout are very valuable resources in the area because of tourism and sport fishing, which have a significant impact on the local economy. The District needs to manage its reservoirs balancing the interests of many to protect community supplies for drinking, sanitation and fire protection, protect fish and aquatic ecosystems, protect supplies for agricultural growers, and sustain agricultural industry development and economic activity.

The District is extremely concerned about the history of water shortage in the watersheds utilized by the District. These watersheds have been well researched. The various hydrology reports review different data, but they all come to the same conclusion, that there is a shortage of water in the Okanagan watersheds.

The District follows Provincial regulations for releases of water from its reservoirs. Despite this, there are times that the District has been asked by the Ministry of Environment or the Oceola Fish and Game Club to release additional water. In addition, dead fish have been observed, even during the spring freshet, when water should be in ample supply.

As a consequence of the known water shortages in the area, the District has taken many steps to try to conserve water, and to increase storage to grow its carry-over storage from two years of consecutive drought to three years of consecutive drought, as is recommended by the Province. Even in non-drought years, the irrigators in Oyama have put themselves on voluntary water restrictions at all times as a conservation measure. In addition, the District has invoked a policy of restricting new development in areas that would be serviced by its upland reservoirs. The implementation of such restrictions has a negative economic impact on the District. The District has also worked with a number of groups, including the Province, the Okanagan Indian Band and the Oceola Fish and Game Club to look at management options to minimize shortages on Middle Vernon Creek.

The Assistant Regional Water Manager has acknowledged the history of water shortages in these watersheds, and that the watersheds are fully recorded and over licensed. Yet the Water Branch continues to license water, and has recently issued licences that allow commercial and domestic users to draw water directly out of the District's reservoirs, despite the Assistant Regional Water Manager's acknowledgment that the water within the reservoirs is fully licensed to the District and is being stored as carry-over to protect against consecutive years of drought. The Assistant Regional Water Manager has taken the position that he is entitled to "double license" water, and that the water that is stored to protect against drought is "unused". This position is contrary to the position that the Assistant Regional Water Manager took in a previous case that was heard before the Environmental Appeal Board (EAB): *B.C. Cattle Co. Ltd.* v. *Assistant Regional Water Manager, Land and Water British Columbia Inc.* 2003-WAT-002. In that decision, the EAB panel agreed with the Assistant Regional Water Manager that there is no legislative basis to "double license" water. Contrary to the *B.C. Cattle* decision, one EAB panel has recently ruled that the Assistant Regional Water Manager does have authority to "double license" water in two cases that were heard together by the same panel: *Southeast Kelowna Irrigation District* (SEKID) v. *Assistant Regional Water Manager* 2012-WAT-016(a) & 2012-WAT-031(a) and *District of Lake Country* v. *Assistant Regional Water Manager* 2012-WAT-G03 (the DLC Appeal). These conflicting approaches by the Assistant Regional Water Manager and the EAB illustrate the need for the new legislation to provide clarity on the issue of whether the Water Manager may "double license" water. The over-licensing of the watersheds is clearly causing adverse effects.

The above-noted appeals raised a number of concerns for the District. One concern is the lack of consistency and transparency in the decision-making of the Assistant Regional Water Manager. In the DLC Appeal, a draft technical report had been prepared by a Water Stewardship Officer and was approved by the Assistant Regional Water Manager and then circulated to all parties with the recommendation that the licences not be issued due to a shortage of water. One month later, a final report that had no technical changes was issued that reversed this recommendation and granted the licences. During the appeal, the Assistant Regional Water Manager testified that this change in the Water Branch's conclusions was the result of the discovery of an internal Guideline that neither the Assistant Regional Water Manager nor the Water Stewardship Officer had been aware of when the first draft was approved. This Guideline is not available to the public. The District is very concerned that a Guideline that is purportedly so important to the decision-making was not known to Water Branch staff and is not available to the public. In addition, a portion of the Guideline is referred to in a case that was raised late in submissions by the Assistance Regional Manager: *Wyatt and Harbidge* v. *Deputy Comptroller of Water Rights* Water Appeal 95/13 (at page 7). That portion of the Guidelines had not been produced in the DLC Appeal, and is not available for review by the parties or the panel, unless the Assistant Regional Water Manager chooses to produce it.

In addition, in the DLC Appeal, the District had filed prior applications to increase the storage capacity of its dams on the basis that there is insufficient water for the District's needs. These applications were pending when the decisions were made to issue lower priority licences based on the Assistant Regional Water Manager's conclusion that the District was not using all of its licensed water. The District is extremely concerned that the Assistant Regional Water Manager's conclusion in the later applications will negatively impact the District's prior applications, despite the fact that the process in the District's prior applications had not yet been completed.

The Assistant Regional Water Manager also testified in the DLC Appeal that political issues surrounding the Land Branch wishing to convert the leasehold properties to fee simple made his file complicated, and that he needed to be sensitive to those issues (which he noted are outside of the *Water Act),* because he is part of government. The politicizing of statutory decisions is a very serious concern.

Further, in the DLC Appeal, it became apparent that most of the licence applicants had been taking water without a licence for decades, contrary to the *Water Act*. The licences were granted with conditions, but at the time of the appeal, some conditions had not been complied with, and no enforcement steps had been taken by the Water Branch. It is clear that there is a need for more enforcement of the requirements of the *Water Act*.

A final process issue that arose in the DLC Appeal involved a First Nations band located downstream of and in the same watershed as the licences being considered. Despite this, a flag in the Water Branch system identifying the band, and evidence from District staff that dead fish had been observed near the band's reserve during the spring freshet of a non-drought year, the Assistant Regional Water Manager did not notify the band of the licence applications, nor give the band an opportunity to object. At the EAB hearing, the band requested standing and an opportunity to present evidence at the appeal regarding the Assistant Regional Water Manager's failure to consult and the impact of the over licensing of the watershed. The EAB did not allow the band to make submissions on its application for standing nor on the duty to consult, and ruled that the band was not allowed to present evidence, but would be allowed 15 minutes to make submissions after the conclusion of the hearing on the limited issue of how the licences in question affect the band. The approach of the Assistant Regional Water Manager and the EAB in the relation to the First Nations band is inconsistent with previous rulings that found that there was a duty to consult (see for example *Anderson and Edwards* v. *Assistant Regional Water Manager* 1998-WAT-023).

Due to the above-noted concerns, the District makes the following recommendations for the new *Act*:

1. The legislation should clearly state that water cannot be double-licensed;
2. The legislation should include provisions to prohibit the Water Branch from over-licensing watersheds;
3. The legislation should clearly include carry-over storage of water to address three years of consecutive drought as a "beneficial use";
4. The legislation should grant priority to community water uses;
5. More resources should be dedicated to enforcement of the requirements of the *Act;*
6. The role and function of the Water Manager should be reviewed. Decision-making should be depoliticized, consistent and transparent. The Water Manager should be prohibited from arguing against the legal or policy position taken before the EAB in a previous case. The Water Manager should be prohibited from drawing conclusions in later applications that can affect prior applications that are incomplete;

7. The role and function of the EAB should be reviewed. The judicial review function needs to be depoliticized and consistent. The EAB should be more judicial and bound by precedent. The mandate of the EAB should include an overseeing function to ensure that decisions of the Water Branch that become politicized are overturned. Alternatively, the EAB could be eliminated and judicial review could be conducted by the Courts. The resultant cost savings could be applied to enforcement of the requirements of the new Act;
8. All Guidelines used by statutory decision makers should be transparent and publicly available; and
9. The Water Branch and the EAB should be required to adhere to the common law duty to consult First Nations in relation to the issuance of water licences, and should accord First Nations procedural fairness.

Regards,

James Baker
Mayor

JB/wp

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