

*Remembering where we came from...*

November 12, 2013

Minister Mary Polak  
Ministry of Environment

**Re: Proposed Water Sustainability Act Legislative Proposal**

Minister Polak

The purpose of this letter is to summarize the Lower Similkameen Indian Band's concerns related to the management of water in British Columbia under the proposed Water Sustainability Act. As you are aware, the proposed *Water Sustainability Act Legislative Proposal* has significant implications for the Lower Similkameen Indian Band. Meaningful and direct engagement is required to ensure that through the legislative drafting and implementation stages, Lower Similkameen Indian Band interests, including Aboriginal Rights, are addressed.

The Lower Similkameen Indian Band is a member of the Okanagan Nation Alliance and is active in advancing our Title and Rights interests' protection, particularly around water. We are involved with regional watershed planning, our own Watershed analysis, and in developing traditional water governance approaches.

The Provincial Government's four-week public consultation process to be conducted only via on-line submissions is wholly unacceptable to the Lower Similkameen Indian Band. The Province of BC is required to consult with the Lower Similkameen Indian Band whenever it proposes a decision or activity that could impact our Aboriginal Rights. The development and implementation of a *Water Sustainability Act* certainly has the potential to impact the Lower Similkameen Indian Band Aboriginal Rights.

In order for meaningful engagement to occur, a relationship must be developed with the Lower Similkameen Indian Band that is respectful of our interests, including our constitutionally protected s. 35(1) Aboriginal Rights. As you are aware, Canada has endorsed the *United Nations Declaration on the Rights of Indigenous People*. As a result Canada has agreed to uphold the expansive and robust principles set out in the declaration that affirm the rights of Indigenous Peoples with respect to their lands, waters and natural resources (e.g. Articles: 25, 26, 29 & 32). The FNFC expects the Government of British Columbia to uphold these principles by taking effective measures to recognize and protect the exercise of BC First Nations' inherent rights.

It is essential that the Lower Similkameen Indian Band Title and Rights interests are recognized and that your government takes all of the steps necessary to ensure that a revised Water Act meets the test of a high and robust consultation and accommodation process with the proper rights-holders in B.C.

British Columbia's Water Act is over 100 years old and while the Lower Similkameen Indian Band agrees that an updated *Water Act* is long overdue, we also impress upon you that that significant



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changes to the proposed *Water Sustainability Act* are required in order to address key issues related to the assertion and exercise of Aboriginal Rights with respect to water resources and its' management. The Lower Similkameen Indian Band submits the following summary of its preliminary concerns related to the current Proposed Water Sustainability Act:

### ***First Nations Title and Rights Recognition***

- There are still unresolved governance and jurisdiction issues related to the assumed jurisdiction of the Province over resources that are subject to Aboriginal Rights. This is an issue which requires a resolution or the negotiation of an agreed upon approach to implementing the *Water Sustainability Act* without resolution of First Nations' governance and jurisdictional issues.
- The "First in Time, First in Right" system of water allocation does not consider the inherent rights that Lower Similkameen Indian Band have in regard to the use and management of waters in the Similkameen Valley and within the Traditional Territory of the Lower Similkameen Indian Band; the Lower Similkameen Indian Band have been using these waters for cultural and sustenance purposes since time immemorial.
- In the context of potential adverse impacts or cumulative effects to fisheries and aquatic resources, the Lower Similkameen Indian Band needs to have input into the determination of Environmental Flow Needs (EFN) and Critical Environmental Flows (CEF) to ensure the maintenance of our fisheries and other water resource dependent resource, including ducks and riparian and wetland plants.
- The exercise of aboriginal management rights for impacted or affected fisheries needs to recognize and include Lower Similkameen Indian Band systems of knowledge and traditional knowledge in the determination of management regimes necessary to protect aquatic health (i.e., CEF and EFN).
- The Lower Similkameen Indian Band needs to participate in the decision making process around license allocation and management during times of scarcity to ensure the protection of the aboriginal fisheries and other Aboriginal rights (see below).
- Consideration of other Lower Similkameen Indian Band Aboriginal rights related to EFN determination and EFN and CEF management include the requirements for maintenance of non-fisheries aquatic resources, vegetation and other animal resources dependent on the EFN.
- The implementation of the *Water Sustainability Act* should respect and accommodate Lower Aboriginal water dependent rights, e.g., fishing, birding, and gathering.

### ***Cultural and Spiritual Use***

- Water use purposes should include a water use category related to First Nations cultural and/or spiritual uses of water. First Nations may be interested in applying for Water licenses/water rights to protect and make available water to conduct unique cultural activities that require water.

### ***Participation in Development (Legislation, Objectives and Regulations)***

- First Nations need to participate in the development of the specific Provincial Water Objectives and in general the drafting of the *Water Sustainability Act* legislation and regulations in order to ensure First Nations interests, including Aboriginal and Treaty rights, are considered in a meaningful way.

### ***Aboriginal Traditional Knowledge (ATK)***

- Water Sustainability Plans and Area Based Regulations should include ATK and a requirement for First Nations to be involved in the development, implementation and monitoring of plans and regulations in respect of First Nations inherent rights
- Commitments to do that should be included in the legislation.

### ***Information Collecting and Monitoring***

- The Lower Similkameen Indian Band can benefit from the information collected through groundwater regulatory requirements.
- The Lower Similkameen Indian Band should be included in the development of the monitoring program development and implementation.
- Saline groundwater wells should be monitored as use and disposal of saline groundwater could have unforeseen impacts that need to be considered, such as ground subsidence, and tailings/discharge water quality impacts to Aboriginal resources.

### ***Agriculture Water Reserves***

- Creation of Agricultural Water Reserves should be required to consider Lower Similkameen Indian Band methods of agricultural or “tending” activities that deliberately generate food or medicinal resources.

### ***Delegated Authority and Regional Water Boards***

- The Similkameen Valley Regional Water Board or similar entity should be required to include the Lower Similkameen Indian Band as full members
- In order to have a meaningful governance structure for the Regional Water Board, the Lower Similkameen Indian Band will need to maintain their appropriate governance authority.
- Delegation of certain decision making authorities to regional water boards or similar structures needs to be planned in order to ensure that delegation of authority to a board is appropriate; or some other appropriate governance structure should be considered as it may not be feasible to delegate assumed provincial authority to the Lower Similkameen Indian Band.
- Research into the best possible methods for developing respectful and fair regional governance bodies needs to occur.

### **Capacity**

- Resources and funding will be required to facilitate First Nations participation in the *Water Sustainability Act* drafting and implementation.
- Resources and funding will be required to facilitate the Lower Similkameen Indian Bands participation in the Regional Water Board.

To improve the Process and to give an opportunity for meaningful engagement and input into a *Water Sustainability Act*, the Lower Similkameen Indian Band recommends the following:

- a) Improve the bi-lateral government-to-government relationship and dialogue with First Nations by engaging directly, and in person, with the Lower Similkameen Indian Band and the Okanagan Nation Alliance;
- b) Provide financial resources to the Lower Similkameen Indian Band and the Okanagan Nation Alliance to undertake a thorough review and analysis of key resource documents such as the *Water Sustainability Act Legislative Proposal* in order to prepare thoughtful and meaningful input for *Water Sustainability Act* revisions;
- c) Extend the consultation period to give adequate time for First Nations to review potential options and draft *Water Sustainability Act* legislation before introducing it to the B.C. Legislature.

The Lower Similkameen Indian Band has offered some initial feedback with respect to the proposed *Water Sustainability Act*, however it is clear that further work and discussions need to take place. It is our sincere hope that the Provincial Government will act diligently and in good faith to respect and accommodate our Aboriginal Rights and will do its utmost to meaningfully engage the Lower Similkameen Indian Band, the Okanagan Nation Alliance and the Provincial First Nations organizations in discussions related to this critical legislation.

The Lower Similkameen Indian Band is interested in further review, analysis and dialogue related to the *Water Sustainability Act*. We look forward to hearing from you to facilitate a process of engagement which addresses our areas of concerns that we have listed above, please contact our office so that we can meaningfully engage.

Sincerely



Chief Keith Crow  
Lower Similkameen Indian Band