AGREEMENT

THIS AGREEMENT dated as of the 15th day of OCTOBER, 2002.

BETWEEN:

CAPITAL REGIONAL DISTRICT
(“CRD”)

AND:

THE T’SOU-KE NATION
(“T’SOU-KE”)

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
as represented by the Department of Fisheries and Oceans Canada
(“DFO”)

AND:

HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA
as represented by the Minister of Water, Land and Air Protection
(“WLAP”)

WHEREAS:

A. T’Sou-ke asserts a special interest in the Sooke River, the management of its watershed, the maintenance of its fish populations and the maintenance of the ecosystem of the Sooke River Watershed;

B. T’Sou-ke asserts both aboriginal rights and rights pursuant to the Douglas Treaties in the waters of the Sooke River, in the Sooke Watershed generally and in the fisheries therein:

C. The Sooke Reservoir and associated facilities, including Deception Reservoir and the proposed Leech River Diversions are an important component of water supply infrastructure of the CRD;

D. These same facilities have had an effect on the flow of water in the Sooke River with some consequent effects on fish populations and habitat in the Sooke River;

E. The Parties have evaluated the impact of the expansion of the Sooke Reservoir on the habitat of indigenous fish in the Sooke Reservoir and its tributaries and in the Sooke River downstream of the Sooke Dam and have agreed on a schedule of water releases, as set out herein, for the management of water releases to the Sooke River;
F. The Parties acknowledge that funds will be applied for from the Federal Provincial Infrastructure Program (Green Municipal Fund) and other sources by the CRD working in association with the T'Souke Nation for the development of the Water Management Plan and associated infrastructure;

G. The Parties acknowledge that this Agreement reflects the measures being taken by the CRD to comply with existing federal and provincial legislation and to address the concerns of T'Souke;

H The Parties have each agreed, subject to meeting the requirements of existing federal and provincial legislation, that steps should be taken to maintain water flows for the conservation and restoration of fish populations and habitat in and around the Sooke River subject to essential public health and drinking water requirements;

I. The Parties have agreed that the effect on the Sooke River of the Sooke Dam, storage/release at Sooke and Deception Reservoir, and the future diversion of the Leech River must be carefully assessed and monitored;

THE PARTIES HEREBY AGREE AS FOLLOWS:

T'SOU-KE FUNDING

1. In order to facilitate T'Souke’s capacity to meaningfully participate in the carrying out of the various negotiations, discussions and planning processes described in this Agreement:

(a) The CRD will pay T'Souke $40,000 per year (for the purpose of paying for technical, legal and other advice related to carrying out these actions and to assist in flow monitoring) for each year this Agreement is in effect including the 12 month period commencing October 1, 2002 and the 12 month period following the effective date of early termination of this Agreement, but not for any period of time after September 30, 2007;

(b) The CRD will pay T'Souke $50,000 for past technical and legal services incurred in respect of the proposal of the CRD to raise the Sooke Reservoir;

(c) The CRD will support T'Souke in applications to third parties for any additional funding required for the services noted in (a); and

(d) The CRD will continue to provide T'Souke, without charge, copies of any technical reports, plans and other materials in the CRD’s possession which may be necessary for carrying out such actions.

HERITAGE CONSERVATION ACT

2. T'Souke acknowledges that the CRD has retained a qualified heritage consultant, Morley Eldridge of Millennia Research Limited, and approved by T'Souke who has conducted and completed a heritage inspection and if recommended by Millenlia Research Limited, to conduct a heritage investigation of all areas to be inundated by the
raising of the Sooke Reservoir or affected by construction operations in relation thereto (including, without limitation, construction roads, marshalling or storage areas or equipment yards) or in relation to the diversion of water from the Leech River. The CRD will bear all costs of such inspections and investigations (including the costs associated with obtaining permits under the Heritage Conservation Act) and shall deliver a copy of the report arising from this investigation to T'Sou-ke. In the event the Heritage Conservation Act is repealed, the heritage inspection and investigation described herein shall be carried out in accordance with the standards that would be expected if such repeal had not occurred.

3. The CRD agrees that it will not apply for a Site Alteration Permit pursuant to the Heritage Conservation Act (or any successor legislation) in respect of any heritage resources identified by the inspection and investigation described in section 2 without the consent of T'Sou-ke as to the mitigative measures to be implemented in regard to such heritage resources, such consent not to be unreasonably withheld. In the event that the Heritage Conservation Act is repealed, the work in question shall not be carried out until the CRD and T'Sou-ke have agreed upon the mitigative measures to be implemented.

SHORT TERM RELEASES

4. (1) Until agreed otherwise by the Parties, the CRD will release water from the Sooke Reservoir into the Sooke River for fish flows in accordance with the following monthly criteria:

(i) subject to (iii), when total reservoir volume is greater than 95 million cubic metres, the release shall be 0.07m3/s + 0.14% of previous month’s total inflow, released uniformly over the month;

(ii) subject to (iii) when the total reservoir volume is less than or equal to 95 million cubic metres and greater than or equal to 88 million cubic metres, then release shall be 0.04m3/s + 0.14% of the previous month’s total inflow, released uniformly over the month;

(iii) when the total reservoir volume is less than 88 million cubic metres or when the CRD has imposed stage 3 or 4 water restrictions (as defined at the signing of this agreement) or when the cumulative inflow in Sooke Reservoir from October 1st to April 1st is less than 40 million cubic metres, the release shall be 0.03m3/s.

(2) Unless otherwise agreed by the parties, and subject to the natural availability of water at Deception Reservoir, the CRD agrees to provide 4.1 million cubic metres of storage at Deception Reservoir for water to be released into the Sooke River for fish flows in accordance with a schedule of flows to be provided by T'Sou-ke and MWLAP.

CRD COMMITMENTS

5. The CRD makes the following commitments, subject to the appropriate regulatory approvals:
(1) **Sooke reservoir**

The CRD will:

(a) raise the Sooke Dam by six (6) metres in compliance with Federal and Provincial Environmental Assessment requirements by March 31, 2003, unless prevented from doing so by an authority having jurisdiction or by reason of force majeure;

(b) operate and maintain the facilities being used to manage flows on the Sooke River; and

(c) explore the feasibility of releasing additional winter flows while maintaining the 96% reliability criteria.

(2) **Deception Reservoir**

The CRD will:

(a) construct a spillway on Deception Reservoir by March 31, 2003; and

(b) operate and maintain the facilities used to release water from Deception Reservoir to Deception Creek in accordance with this Agreement.

(3) **Leech River**

The CRD will:

(a) undertake water quality research on the Leech River to determine the water quality impact of diverting the Leech River to the Sooke Reservoir;

(b) complete the Leech River Diversion to Deception and Sooke Reservoirs based on the reliability criteria adopted by the Regional Water Supply Commission, i.e. 96%, but not sooner than the year 2010 and no later than 2015; and

(c) explore the potential for activating the Leech Tunnel sooner for winter flows only to Deception Reservoir.

(4) **Watering Restrictions:**

The CRD will introduce watering restrictions as necessary to maintain conservation flows in accordance with this Agreement recognizing that water supply to the CRD for essential public health and drinking water requirements must be assured at all times.

(5) **Funding**

The CRD, in cooperation with T'Sou-ke, will apply for funding under the Green
Municipal Funds Program.

(6) Licence Application

The CRD will apply for all the necessary licences under the Water Act.

T'SOU-KE COMMITMENTS

6. (1) T'Sou-ke agrees not to take any legal proceedings to enjoin or stop the raising of the Sooke Reservoir in accordance with section 5(1)(a), provided that such work is carried out in accordance with this Agreement.

(2) T'Sou-ke agrees that as long as this Agreement is in effect and the water releases into the Sooke River are maintained in accordance with section 4 it shall not commence any proceeding in respect of the then current releases.

WATER LEVEL MONITORING

7. Water level and any other monitoring will be carried out in accordance with the Fisheries and Oceans authorization, and any provincial regulatory requirements.

8. (1) The results of the monitoring regime described in section 7 shall be reported to all parties in written form annually. The data collected by the monitoring regime shall be made available to the parties or their advisors upon request.

(2) T'Souke's involvement in monitoring activities is at their discretion and in accordance with section 7.

(3) The Parties shall meet three times per year or as mutually agreed to review the results of the monitoring program. Other interested government agencies may be invited to the meetings.

(4) The Parties may modify the releases established by section 4 based on the results of the monitoring program, taking into consideration the total available water release volume.

APPLICATION FOR NEW AND AMENDED WATER LICENCES

9. (1) CRD shall apply for all necessary regulatory approvals.

(2) CRD shall apply to amend the existing licences for Deception Creek and Deception Reservoir, including but not limited to the following: to change the purpose from 'waterworks' to 'conservation' and to amend the existing licences for Sooke Reservoir from 'waterworks' to 'waterworks and conservation'.

(3) When applying to amend existing water licences or for new water licences, the CRD shall, to the fullest extent possible, apply to have the relevant terms of this Agreement form part of the conditions imposed on any amended or new water licence, in particular the releases set out in section 4, including any revision to
these releases following completion of a Water Management Plan and receipt of the appropriate regulatory approvals in respect of that Plan or any modification to the Release Schedule under section 8(4).

WATER MANAGEMENT PLAN

10. The Parties agree that they shall as quickly as possible commence working toward a mutually agreeable Water Management Plan for the parts of the Sooke Watershed owned or controlled by the CRD. Subject to applicable regulatory approvals, this Water Management Plan is intended to comprehensively deal with all issues relating to the management and use of water flows and alterations and allocations thereof, and shall include the Sooke River, Deception Creek, Council Creek and the Leech River, and shall include, without limitation,

(a) an analysis of what waterflows are necessary and can be maintained for the purpose of conserving and building fish stocks and habitat in the Sooke River;

(b) an analysis of what steps are needed to ensure an adequate supply of water for the CRD;

(c) a water release program as set out in section 4 hereof for the purpose of releasing water for fishery conservation and restoration in the Sooke River;

(d) a monitoring program as set out in section 7 hereof; and

(e) a detailed description of the principles to govern the management of water releases.

11. The Parties agree that they shall make best efforts to complete the Water Management Plan before September 30, 2007.

12. After the completion of the Water Management Plan, the CRD shall apply to amend their water licences under the Water Act and the CRD shall, to the fullest extent possible, apply to have the relevant terms of the Water Management Plan form part of the conditions imposed on amended or new water licences.

WATERSHED MANAGEMENT PLAN

13. The Parties agree that they shall as quickly as possible commence working toward a Watershed Management Plan for the Sooke Watershed in co-operation with other landowners, licensees, tenure holders and interested agencies in the Sooke Watershed. This Watershed Management Plan shall include, without limitation,

(a) the Water Management Plan;

(b) a plan for land and resource use in the lands in Sooke Watershed; and

(c) a plan for a process to adaptively manage the Sooke Watershed into the future.

CONSULTATION: WATER LEVELS
14. The CRD agrees to consult with T'Sou-ke and the parties in respect of situations not provided for in this Agreement such as unusually low or high water levels or other emergencies requiring action on the part of the CRD. Consultation shall proceed as follows:

(a) the CRD shall notify T'Sou-ke and the parties as quickly as practicable in the circumstances;
(b) it shall provided reasonable information requested by T'Sou-ke or its technical consultants;
(c) it shall arrange to meet with T'Sou-ke and the parties or such representatives as T'Sou-ke may appoint as soon as possible in the circumstances;
(d) it shall where feasible attempt to address T'Sou-ke and the parties' concerns in the circumstances; and
(e) in the event that such consultation will require T'Sou-ke to incur expenses not reasonably encompassed within the work expected to be carried out in fulfilling the other requirements of this Agreement:
   (i) T'Sou-ke may apply to the CRD for the payment of these reasonable expenses;
   (ii) the CRD shall consider such an application and shall not unreasonably refuse to pay such additional expenses, to a maximum of $5,000.00 per year during the term of this Memorandum of Agreement or any extension of that term.

OBLIGATIONS OF THE REGULATORY AGENCIES

15. DFO agrees, subject to regulatory requirements,

(a) to issue a Precedent Authorization that reflects this Agreement, subject to section 25; and
(b) to facilitate approval of raising the Sooke Reservoir by six (6) metres;

16. DFO and WLAP agree to

(a) review the threshold flow in the Sooke River at the Charters Creek hydrometric station which must currently be met or exceeded before water from the Leech River can be diverted into either Deception Reservoir or Sooke Reservoir. CRD agrees to submit an application to amend their water licence(s) under the Water Act if the review indicates that the threshold flow may be reduced;

and, in conjunction with the T'Sou-ke Nation, to the extent the T'Sou-ke Nation chooses to participate in such monitoring,
(b) monitor the fishery downstream of the Sooke Dam.

OBLIGATION TO CONSULT

17. T'Sou-ke agrees that this Agreement demonstrates consultation by the CRD within the meaning of s. 35(1) of the Constitution Act, 1982 with respect to the Sooke River fishery. T'Sou-ke does not agree that such consultation is adequate or complete for any purpose except the raising of the Sooke Dam and the water releases under sections 4 and 8(4) in accordance with this Agreement.

NEW WATER LICENCES

1. Except as provided in sections 9, 5(6) and 12, the CRD shall not, without consulting with T'Sou-ke, apply for any amendment to its existing Water Licences or any new Water Licence, for or in respect of any of the Sooke Reservoir, the Deception Reservoir, the Leech River or any other river or body of water in the watershed of the Sooke River, until the Water Management Plan has been agreed upon. Nothing herein shall be construed as fettering the exercise of statutory discretion or statutory authority by a statutory decision maker.

33.

ABORIGINAL AND DOUGLAS TREATY RIGHTS

34. 35. The Parties agree that this Agreement does not in any way limit, suspend, modify, abrogate or derogate from such aboriginal or treaty rights as T'Sou-ke or its members may have, whether arising from the Douglas Treaties or otherwise.

36. 20. For greater certainty, the parties acknowledge that T'Sou-ke, for the purpose of this Agreement or in relation to its dealings with the matters dealt with in this Agreement, has not been authorized to in any way limit, suspend, modify, abrogate or derogate in any way from the rights described in section 19.

37. 21. T'Sou-ke agrees that any Party may refer to this Agreement for the purpose of demonstrating an attempt at consultation within the meaning of s. 35(1) of the Constitution Act, 1982 but T'Sou-ke shall not be taken to have agreed that this Agreement or anything carried out pursuant to this Agreement is adequate consultation or constitutes consultation at all in respect of an issue, except as set out in section 17 hereof.

TERMINATION AND SURVIVAL OF OBLIGATIONS

22. This Agreement shall terminate, unless otherwise agreed by the Parties in writing, on the earlier of

(i) September 30, 2007, or

(ii) the adoption by the CRD of the mutually agreed upon Water Management Plan after receiving the appropriate regulatory approvals.

23. The effect of termination shall be that each Party shall be relieved of all obligations under this Agreement, except where provided otherwise by section 24.
24. The Parties expressly agree that sections 1(a), 3, 17 to 21, and 23 will survive and remain enforceable after the termination of this Agreement, including the obligations of Section 4 that continue for 6 months after termination.

25. The Parties agree that this Agreement shall not fetter DFO issuing or enforcing an Authorization pursuant to the Fisheries Act. Nothing herein shall be construed as fettering the exercise of statutory discretion or statutory authority by any other statutory decision maker.

IN WITNESS the parties have signed and sealed this Agreement on the 15th day of October, 2002.

CAPITAL REGIONAL DISTRICT by its authorized signatories:

[signature]
Chair

[signature]
Corporate Secretary

SIGNED, SEALED AND DELIVERED by the T'Sou-ke Nation pursuant to the consent of the majority of the Councillors of the T'Sou-ke Nation present at a meeting duly convened at which authority was given for the T'Sou-ke Nation to enter into this Agreement as recorded in a Band Council Resolution.

[signature]
Councillor

[signature]
Councillor

Witness

[signature]
10. Beach Drive

Address

Victoria, V8S 2V2

[signature]
Professor & Engineer

Occupation
SIGNED HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by the Minister of Fisheries and Oceans in the presence of:

[Signature]

RON KADOWAKI
Area Director
Fisheries and Oceans Canada

Signed by HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA as represented by the Minister of Water, Land and Air Protection in the presence of:

[Signature]

NANCY WILKIN
Assistant Deputy Minister
Environmental Stewardship
Ministry of Water, Land and Air Protection

11-Oct-02/227 078/Agreement/JL/UR