

This Agreement dated the \_\_\_\_ day of \_\_\_\_\_, 2003

BETWEEN:

CITY OF KELOWNA

(the "City")

AND:

OKANAGAN UNIVERSITY COLLEGE

("OUC")

WHEREAS:

- A. The City operates a wastewater treatment plant (the "Treatment Plant") on lands adjacent to OUC's K.L.O. Road campus (the "OUC Lands") in the City of Kelowna.
- B. Waste water which is treated at the Treatment Plant (such water being referred to herein as "Effluent") is disposed of via a discharge pipe (the "Pipe"), which extends from the Treatment Plant across the OUC Lands and other lands to a point of discharge to Okanagan Lake.
- C. The presence of the Pipe and the conveyance of the Effluent across the OUC Lands is the subject of a Statutory Right of Way agreement between the City and OUC, which is registered against the OUC Lands in the Kamloops Land Title Office under registration number KD56403 (the "SRW Agreement").
- D. OUC wishes and the City has agreed that OUC may connect to the Pipe at a point within the OUC Lands (the "SRW Area") to withdraw and divert Effluent to buildings on the OUC Lands where heat will be reclaimed from the Effluent into OUC's heating distribution system. The resulting cooled Effluent will then be returned to the Pipe at a point within the OUC Lands for its eventual disposal into Okanagan Lake.

Now therefore this Agreement witnesses that in consideration of the premises, covenants, warranties and representations herein contained, and of the sum of One (\$1.00) Dollar now paid by OUC to the City (the receipt and sufficiency of which is hereby acknowledged by the City) and for other good and valuable consideration, the parties hereby agree as follows:

1. The City hereby grants to OUC the right and licence to connect to the Pipe and to extract and divert a maximum of 1,200 gallons per hour of Effluent to extract heat therefrom and to then return the Effluent to the Pipe for disposal.
2. The right and licence granted under Section 1 herein includes the right to construct a chamber (the "Chamber") adjacent to the Pipe to house a pump and other related and ancillary works and equipment (the "Pumping Works") which will extract and convey the Effluent to OUC's heat extraction equipment.
3. Prior to the commencement of the construction or installation of the Chamber or Pumping Works, any modification of the Pipe, and prior to any excavation related to the construction or installation of the Chamber or Pumping Works, OUC must submit plans of the proposed construction, installation, modification, excavation or site landscaping to the City Wastewater Division and obtain the approval of the Wastewater Manager. For greater certainty, the requirements of plan submission and approval from the Wastewater Manager apply to any subsequent modifications, construction, installation or excavation and are not limited to the initial work.
4. OUC agrees and acknowledges that the right and licence granted under Section 1 herein is without any implication that the Effluent will be of a certain quality, volume or temperature and OUC expressly acknowledges that no representation or warranty, express or implied, has been made or given by the City regarding the condition or quality of the Effluent. OUC agrees that it takes the Effluent "as is".

5. OUC agrees and warrants to the City that it will install, maintain and repair, as part of the Pumping Works or the Works (defined below), such protective devices or equipment as are necessary:
  - (i) to prevent the introduction of any contaminant or caustic or corrosive agent (the "Contaminants") into the Effluent once it has entered the Works until it is returned to the Pipe,
  - (ii) to monitor the quality of the Effluent following the heat extraction by OUC and prior to its return to the Pipe so as to be able to identify the presence of any Contaminant which may have been introduced by OUC in a timely manner, and
  - (iii) to monitor for any ruptures in OUC's pipes or for any escape of returned Effluent from OUC's pipes prior to or at the point of connection to the Pipe.
6. OUC agrees that it will immediately notify the City of the presence of any Contaminant in the Effluent returned to the Pipe that is introduced into the Effluent from the point the Effluent entered the Works until the point it is returned to the Pipe or in the event of any rupture in OUC's pipes or of any escape of returned Effluent.
7. OUC agrees that, notwithstanding its covenants and agreement in Section 5 and 6 herein, the event of:
  - (i) the introduction of a Contaminant into the Effluent before its return to the Pipe,
  - (ii) a rupture in OUC's pipes, or
  - (iii) an escape of Effluent from OUC's pipes at, or at any point beyond, the point of connection to the Pipe;

OUC will immediately (a) cease drawing Effluent from the Pipe and cease returning Effluent to the Pipe, (b) engage its back-up heating equipment or back-up heat supply, and (c) refrain from pumping or using any Effluent until:

- (iv) the source or cause of introduction of the Contamination has been identified and rectified or repaired,
- (v) the rupture in OUC's pipes has been repaired, or
- (vi) the escape of returned Effluent has ceased.

8. OUC agrees that the Chamber will incorporate locks, fences or other security equipment to prevent unauthorized access to the Chamber, the Pumping works, Works (defined below) or the Pipe.
9. In consideration of the City entering into this Agreement, OUC shall pay to the City the sum of \$1.00 upon execution hereof and there shall be no further charge or fee whatsoever payable by OUC to the City for the rights granted under this Agreement including, without limitation, for the use of the Effluent.
10. (a) The term of this Agreement shall be for twenty (20) years from the date hereof, provided that the City requires the Treatment Plant to be operated and Effluent is to be conveyed through the area described in the SRW Agreement. Nothing in this Agreement shall require the City to continue to operate the Treatment Plant or convey Effluent through the Pipe if the City ceases to operate the Treatment Plant or to discharge Effluent via the Pipe, whether as a result of the City's own unfettered decision or as a result of any requirement by federal or provincial regulatory authorities that affects the operation of the Treatment Plant, the treatment of waste or the operational certificate pursuant to which the City is authorized to discharge treated effluent to Okanagan Lake.

- (b) The City hereby grants to OUC the right to renew the term of this Agreement at the expiration of the initial 20 year term described in paragraph 10(a) upon OUC's written request delivered to the City not earlier than 365 days and not later than 180 days prior to the expiration of the initial term upon all of the same covenants, agreements, conditions and provisos contained in this agreement including, without limitation, that the renewal term shall be 20 years and the cost to OUC shall be as described in paragraph 8, and except that there shall be no further right of renewal.
11. OUC shall bear all costs related to the installation, maintenance, repair and replacement of the system of waterworks necessary to hook into the Pipe and to extract and divert the Effluent as contemplated herein, which will include, without limitation, all pipes, conduits, hydrants, valves, fittings, systems, wells, pumps and other ancillary equipment in connection therewith (collectively the "Works").
12. OUC will be responsible for any and all costs incurred by the City in responding to any Contaminant that was introduced into the Effluent from the point it entered the Works until the point it was returned to the Pipe (the "Clean-Up Costs"), whether or not such costs are incurred as a consequence of the City responding to any order, direction or requirement of any federal or provincial regulatory authority. OUC shall reimburse the City promptly for such Clean-Up Costs upon receiving an invoice or statement outlining the Clean-Up Costs.
13. OUC shall indemnify and save harmless the City and its officials, agents, and employees from and against any and all actions or causes of action, proceedings, prosecutions, claims, demands, damages, costs, loss or expenses of whatsoever kind (including, without limitation, reasonable legal fees on a solicitor and client basis) which the City or its officials, agents or employees may sustain, incur, face or be put to by reason of or arising out of:

- (i) the exercise by OUC of the rights and privileges granted to them under the terms of this Agreement,
  - (ii) any act or omission of OUC or any persons from whom OUC is, at law, responsible, as it pertains to this Agreement between the parties, and
  - (iii) without limiting the generality of the foregoing, from the non-observance or non-performance by OUC or any persons for whom OUC is, at law, responsible, of any of the obligations imposed under the provisions of any laws, regulations, or other requirements of any federal, provincial, municipal, or other authority, or any of the covenants, agreements, terms, condition, and provisos contained in the Agreement to be observed and performed by OUC; and such liability to indemnify and save harmless shall survive any termination of this Agreement and the expiry of the term of any extension thereof, anything in this Agreement to the contrary notwithstanding.
14. The parties hereto each covenant and agree with the other that the Effluent removed from the Pipe by OUC will be used only by OUC and only for the purpose of reclaiming heat to be used within OUC's heat distribution system.
15. Nothing herein shall obligate or require the City to provide a minimum or fixed quantity or temperature of Effluent to OUC for heat extraction purposes. OUC acknowledges that the supply of Effluent may be subject to interruption and OUC acknowledges the need for back-up heating equipment or back-up heat supply in the event of interruption in the flow of Effluent or termination of this Agreement.
16. The right and licence granted to OUC herein shall include the full, free and uninterrupted right at all times to pass over the SRW Area and the right of uninterrupted ingress, egress and regress for OUC, its servants, agents and licencees over the SRW Area with or without vehicles, supplies or equipment, to facilitate the installation, maintenance, repair and replacement of the Chamber, Pumping Works and Works. OUC agrees that, in

exercising these rights, it will act reasonably so as not to interfere with or abrogate any of the rights granted to the City under the SRW Agreement.

17. Notwithstanding any other term of this Agreement, the City agrees as follows:

- (a) it shall not permit any other party to divert or remove the Effluent from the Pipe in the area between the Treatment Plant and the Chamber without the prior written agreement of OUC. OUC agrees that it will not withhold its written consent where the withdrawal of Effluent will not impair its ability to optimize the extraction of heat;
- (b) that the City will not at any time hereafter do or knowingly permit to be done any act whatever nature or kind that will jeopardize or interfere with the exercise of the rights granted herein or knowingly permit to be done any other thing which might reasonably be expected to cause any damage to or interfere therewith;
- (c) the City will not allow at any time, nor in any manner, any building or structure nor the operation of any undertaking in the SRW Area which could impede the extraction of Effluent by OUC from the Pipe as contemplated herein;
- (d) it shall not, nor permit any other person to erect, place, install or maintain any building, structure, mobile home, concrete driveway or patio, tree, pipe, wire or conduit on, over or under any portion of the SRW Area so that it in any way interferes with or damages or prevents access to or is likely to cause harm to Chamber, Pumping Works, or Works authorized hereby to be installed in or upon the SRW Area;
- (e) not do nor knowingly permit to be done any act or thing which will interfere with or injure the said Chamber, Pumping Works, or Works and in particular will not carry out any blasting or excavation on or adjacent to the SRW Area without the consent in writing of OUC, provided that such consent shall not be unreasonably withheld;

- (f) not substantially diminish or increase the soil cover over any of the Chamber, Pumping Works, or Works installed in the SRW Area and in particular, without in any way limiting the generality of the foregoing, will not construct open drains or ditches along or across any of the Chamber, Pumping Works, or Works installed in the SRW Area;
  - (g) notwithstanding any rule of law or equity to the contrary, any of the Chamber, Pumping Works, or Works brought onto, set, constructed, laid, or erected in, upon or under the SRW by OUC shall at all times remain the property of OUC notwithstanding that the same may be annexed or affixed to the freehold or to the Pipe and shall at any time and from time to time be removable in whole or in part by OUC.
- 18. The parties hereto each covenant and agree with the other that upon termination of this Agreement or in the event that OUC abandons the Chamber, the Pumping Works or the Works, or any part thereof, OUC shall, if so required by the City, remove the Chamber, the Pumping Works or the Works so abandoned and restore the SRW Area to the condition it was in prior to the installation of such works, as far as reasonably possible, and restore the Pipe and the SRW Area to the condition they were in prior to the installation of such works, and using methods and means satisfactory to the City as far as reasonably possible.
- 19. Notwithstanding Section 10 herein, this Agreement shall terminate:
  - (a) upon OUC providing 60 days written notice to the City of its intention to terminate this Agreement;
  - (b) upon the City providing one year written notice to OUC that the Treatment Plant will cease to operate or that the Effluent will no longer be conveyed across the OUC Lands through the area described in the SRW Agreement;



- (c) at the option of the City in the event OUC violates any covenant, agreement or stipulation contained in this Agreement on OUC's part to be kept and such default continues for 30 days after written notice of such default given by the City to OUC provided that OUC shall not be in default in the event the nature of the default is one which cannot be remedied within the 30 days notice period provided and OUC is diligently working towards remedying the default, except that, should any of the conditions or events described in Section 5, 6 or 7 herein occur or arise, and OUC not have, within 7 days, effected such remedy or repair as may be required to bring the condition or event to cessation and to remediate any damage caused by such condition or event (excepting that which cannot be remediated within 7 days provided that OUC is diligently working towards remediation of such damage), the City shall have the option to terminate this Agreement.;
- (d) at any time upon written agreement of the parties.

**CITY OF KELOWNA**

Per: \_\_\_\_\_  
Authorized Signatory

Per: \_\_\_\_\_  
Authorized Signatory

**OKANAGAN UNIVERSITY COLLEGE**

Per: \_\_\_\_\_  
Authorized Signatory

Per: \_\_\_\_\_  
Authorized Signatory