

Memo



Date: January 11, 2011

File: 0705-30

To: City Manager

From: David Graham, Director of Strategic Initiatives

Subject: Sewer Effluent Servicing Agreement with the Okanagan Indian Band

Recommendation:

THAT City Council approves the Okanagan Indian Band Sewer Effluent Servicing Agreement for 9450 Jim Bailey Road as attached to the January 11, 2011 report from the Director of Strategic Initiatives;

AND THAT Council authorize the Mayor and City Clerk to sign the Okanagan Indian Band Sewer Effluent Agreement on behalf of the City of Kelowna.

Purpose: The attached agreement with the Okanagan Indian Band (OIB) is required to allow a connection and on-going sewer services for a sixteen unit apartment building at 9450 Jim Bailey Road in OIB I.R. #7, lands that are within Kelowna City limits but not presently serviced by the City of Kelowna sewer utility.

Background:

The Okanagan Indian Band approached the City of Kelowna seeking sewer services for the lands at 9450 Jim Bailey Road, as described in the attached legal agreement. While the lands are outside of the area presently served by sewer, City staff believed that it is in the interests of the community to have this particular location brought within the service area. The benefits to the community as a whole include:

- Providing servicing required to allow the completion and future occupancy of sixteen units of affordable rental housing
- Demonstrating a good working relationship between the Okanagan Indian Band and the City of Kelowna
- Reducing the use of septic fields

The requirements for providing sewer servicing for this site are consistent with the City's normal servicing requirements. The Okanagan Indian Band lands however do not fall under the City's sewer serving bylaws. The purpose of the legal agreement is to put in place the same regulations and controls normally done by bylaw.

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The City does not have a municipal domestic water service available for this location and has therefore required the OIB to obtain water from the District of Lake Country, who has a water main running through this property.

The legal agreement does the following:

- Requires the OIB to pay fees associated with the sewer connection in advance of making the connection
- Requires to OIB to pay all design and construction costs associated with the connection
- Requires the OIB to provide bonding for all construction works
- Requires OIB to meet the City's design requirements for the sewer service
- Requires the OIB to pay all sewer user fees in the future
- Requires the OIB to obtain water services from the District of Lake Country
- Requires the OIB to follow all City bylaws in relations to sewer services and uses
- Restricts the sewer service to these 16 residential units only
- Creates legal mechanisms for the City to address default
- Requires the City to provide sewer services to 16 residential apartments at 9450 Jim Bailey Road on I.R. #7

Internal Circulation:

The City's Development Services Department, Development Engineering Branch; and Infrastructure Planning Department, Utilities and Assets Branch were involved in establishing the requirements for this servicing and ensuring that it is being done consistently with the City's normal requirements.

Legal/Statutory Authority: The City's legal counsel drafted the agreement and advised that the City has the legal authority to enter into such an agreement. The agreement has been duly authorized by the Okanagan Indian Band and has been signed by the Band Chief and three Councillors of the Band.

Legal/Statutory Procedural Requirements: A resolution of Council is required to authorize this agreement because the lands do not fall under the City's sewer servicing bylaws. The City does not have a municipal water supply available to this site at this time. The Agreement must be considered in a public meeting of Council.

Existing Policy: The City requires lands receiving sewer services from the City to be within a Sewer connection Area. It is the intent of the Infrastructure Planning Department to bring forward recommendations to Council to bring this site within Sewer Service Connection Area #32 which is presently immediately adjacent to this site. It is a Condition Precedent to this Agreement that the Band enter into an agreement with the District of Lake Country for the supply of water, prior to receiving a sewer service from the City.

Financial/Budgetary Considerations: Under the attached Agreement, the Okanagan Indian Band is required to pay all fees associated with the servicing in advance of receiving the service. In addition, the band is committing to pay the normal on-going sewer user rates for the 20 year term of the agreement.

Considerations not applicable to this report:

Personnel Implications:

External Agency/Public Comments:

Community & Media Relations Comments:

Alternate Recommendation:

Submitted by:



D. Graham
Director of Strategic Initiatives

cc: Director of Development Services
Director of Infrastructure Planning

Attachment: Legal Agreement



OKANAGAN INDIAN BAND – SEWER EFFLUENT SERVICING AGREEMENT

THIS AGREEMENT is dated for reference the 26th day of July, 2010

BETWEEN:

CITY OF KELOWNA, a municipal corporation under the *Community Charter* and the *Local Government Act* having its municipal offices at 1435 Water Street, Kelowna, British Columbia, V1Y 1J4

Fax number: (250) _____

(the "City")

AND:

OKANAGAN INDIAN BAND, as represented by its **DULY CONSTITUTED COUNCIL**, having its Band administrative office at 12420 Westside Road, Vernon, British Columbia, V1H 2A4

Fax number: (250) _____

(the "Band")

WHEREAS:

- A. The City and the Band have agreed to work together in the spirit of cooperation and good government-to-government relations;
- B. As a local government, the City has established sanitary sewage disposal as a municipal service to parts of the land area within its boundaries;
- C. Under section 18 of the *Indian Act*, R.S.C. 1985, C.I-5, the land commonly known as Duck Lake Indian Reserve No. 7 as specifically shown on Schedule "A" to this Agreement (the "Reserve") is a reserve held by Her Majesty the Queen in Right of Canada for the use and benefit of the Band;
- D. The Band wishes the City to provide, on the terms and conditions of this Agreement, sewage disposal services to a 16 unit apartment building located at 9450 Jim Bailey Road on that part of the Reserve known as Lot 13, as specifically shown on Schedule "B" (the "Service Area");
- E. The City wishes to contract with the Band to provide these services to the Band, on the terms and conditions of this Agreement, as part of the City's provision of municipal services under the *Community Charter*;



NOW THEREFORE in consideration of the payments, promises and premises of this Agreement and other good and valuable consideration (the receipt and sufficiency of which are hereby expressly acknowledged by both parties), the City and the Band covenant and agree as follows:

PART 1 - PROVISION OF SERVICES

Supply of Service

1. The City agrees to provide to the Band and the Band agrees to purchase from the City, on the terms and conditions of this Agreement, the service of sanitary sewage disposal to the Service Area (the "Service").

Conditions Precedent

2. The parties' obligations under section 1 are conditional upon:
 - (a) **Water Agreement**—The Band entering into an agreement with the District of Lake Country for the provision of water services to the Reserve (or to any smaller portion of the Reserve provided that such smaller portion includes the Service Area under this Agreement), which agreement must be for a term as long as or longer than the term of this Agreement as set out below; and
 - (b) **Construction of Off-Site and On-Site Works**—The Band designing, constructing, and installing, all at its own expense:
 - (i) all works necessary to extend the City's existing sanitary sewer system to the Service Area and associated frontage upgrades to Jim Bailey Road (the "Off-Site Works"); and
 - (ii) all works on the Reserve necessary to connect the City's sanitary sewer system to the Service Area (the "On-Site Works"),

all in accordance with good engineering practices and in accordance with the standards to which the City would require similar works to be designed, constructed and installed by developers of non-reserve lands in the City under the City's subdivision servicing bylaws; and
 - (c) **Payment of Development Fees**—The Band paying to the City all application, permit, connection and administration fees, charges or expenses related to the Off-Site Works and On-Site Works.
3. The conditions in section 2 are for the benefit of both the City and the Band and cannot be waived.
4. For clarity, the Band acknowledges and agrees that the requirements in subsections 2(b) and 2(c) are the City's standard development requirements and the Band agrees to

comply with the City's off-site and on-site construction requirements, including requirements to engage qualified professionals, to prepare and provide various drawings, plans and reports and to post acceptable security, all in the same manner as would be required of developers of non-reserve lands.

Commencement of Service

5. If the City's Development Engineer, acting reasonably, determines that the Band has satisfied the conditions in section 2, the City will promptly provide written authorization to the Band to connect the Service Area to the City's sewer system and the City's obligation to supply the Service under this Agreement and the Band's obligation to pay for the Service under this Agreement commences on the day such authorization is issued (the "Commencement Date").

Term of Agreement

6. This Agreement is for 20 years, commencing on the Commencement Date.

Payment for Services

7. The Band agrees to pay the City for the Service an amount equal to 16 (being the number of dwelling units in the Service Area) multiplied by the monthly rate per dwelling unit as the City would charge from time to time under its sanitary sewage rates bylaws to residential users of the City's sanitary sewage disposal system within that area of the City shown in Schedule "C" to this Agreement and generally known as Sewer Connection Area #32 (the "Service Fee").
8. The City will deliver to the Band invoices for the Service Fee on a quarterly basis.
9. The Band will pay the Service Fee and all other amounts payable by it to the City under this Agreement within 30 days of receipt of an invoice.

Taxes

10. The Band will pay all applicable taxes in respect of the Service under this Agreement.

Access to Reserve and Service Area

11. The City may enter the Reserve and the Service Area to perform activities, works or inspections relating to the conditions in section 2 or to the provision of the Service under this Agreement in the same manner and subject to the same conditions as are applicable to non-reserve lands.

Standard of Service

12. Subject to any specific standard set out in this Agreement, the City will provide and the Band will accept the Service on generally the same terms and conditions and subject to the same limitations as the City provides the same service to municipal residents not on the Reserve and without limiting the foregoing, the Band agrees that the City, by entering into this Agreement, is not contracting to provide to the Band any services of a higher standard than the City provides generally.

Sewage Disposal Works

13. The Band and the City acknowledge that the sanitary sewer trunk main and all other sewage disposal works located along, within, above or below City highways and other City-owned lands, including the Off-Site Works along, within, above and below Jim Bailey Road, belong to the City, notwithstanding that the Band may have installed the works or paid for their installation, and that the sanitary sewage disposal system from the property line of the Reserve to the Service Area onward, within the Service Area and to the building on the Service Area, is a private sewer system that has been installed by and is owned by the Band.

Repair and Maintenance of Works


14. The City acknowledges that the Band is not responsible for any costs of repair, replacement, alteration or maintenance of the sanitary sewer main, sewer connection and other sewer works along Jim Bailey Road to the boundary of the Reserve, with the City being responsible for that work, and the Band acknowledges that the City is not responsible for any costs of repair, replacement, alteration or maintenance of the private sewer lines or other sewer works at or beyond that point, and the Band is responsible for all of that work.

Capital Liabilities

15. Nothing in this Agreement requires the City to make expenditures of a capital nature.

Permitted Uses

16. The Band agrees that it will permit the sanitary sewage disposal service supplied by the City under this Agreement to be provided only to occupants of the 16 residential dwelling units within the building on the Service Area from time to time for domestic use (whether those dwelling units are occupied by members of the Band or persons who are not Band members). The Band represents and warrants to the City that it will immediately cause the cessation of any future non-domestic use of the sewer system.



17. The Band shall ensure the Service is not used to service any residential or other development on the Reserve other than the 16 unit apartment building within the Service Area unless a further servicing agreement is first entered into between the City and the Band relating to the servicing of the proposed development. Nothing in this Agreement obliges the City to enter into any such agreement.
18. Without limiting the generality of sections 16 and 17, the Band will not cause, permit or allow the connection of any storm drainage or other ground water drainage to the Off-Site Works or On-Site Works.

PART 2 - CITY AND BAND BYLAWS

19. The Band acknowledges that City bylaws regulating sanitary sewage disposal may be applicable to the Reserve and the City may enforce its applicable bylaws on the Reserve.
20. The Band will not adopt a by-law that is inconsistent with this Agreement or inconsistent with the City's bylaws on the subject of sanitary sewage disposal.
21. The Band will enforce its own by-laws in respect of conduct that does or possibly could have an impact on the Service, the Off-Site Works or the On-Site Works.

PART 3 - DEFAULT, SUSPENSION AND TERMINATION

Default

22. If:
 - (a) the Band should fail to pay monies to the City as required under this Agreement;
 - (b) the Band should breach any other term of this Agreement; or
 - (c) the Band is causing or permitting conditions on the Reserve that the City considers to be:
 - (i) a present or imminent risk to health or safety of persons or property; or
 - (ii) contrary to any City bylaw regulating sanitary sewage disposal,

that will constitute a default under this Agreement and the City may give to the Band a notice of default requiring the default to be cured within 30 days of the Band's receipt of notice if the default is a failure to pay monies or 60 days for other defaults (or such longer time as the City may consider reasonable for curing the default), EXCEPT that in the case of an emergency that the City considers may threaten the health or safety of persons or property, the City may require the Band to remedy the default within 24 hours or less time, depending on the circumstances of the emergency.



City May Remedy

23. If the Band fails to remedy a default within the time specified by the City, the City may (although the City is not obligated to do so), at any and all times, take all steps considered necessary by it to remedy a default of the Band under this Agreement, including by entering onto the Reserve and within buildings on the Reserve.
24. Notwithstanding any other section of this Agreement, in the case of an emergency that the City considers threatens the health or safety of persons or property, the City may choose to immediately remedy a default of the Band without giving the Band a notice of default or any opportunity for the Band to cure the default, but in that case the City must as soon as possible give the Band a notice of the actions that the City has taken and the reasons for it.
25. The Band must within 15 days of receipt of an invoice from the City pay to the City all its costs of remedying Band defaults, including costs of contractors, subcontractors, engineers and other professional advisors, plus a 15% addition as partial compensation for City staff time.

Suspension

26. If the Band should default under this Agreement and the Band does not cure the default within the time specified by the City within a notice of default, the City may give at least 60 days' notice to the Band that the Council of the City will be considering adoption of a bylaw to suspend the Service.
27. At the meeting of the Council of the City pursuant to the preceding section, the Band, members of Band Council, and members of the Band are entitled to appear before Council, including through legal representation, and to have copies of all information that Council will be considering (other than privileged information and other information that must not, by law, be disclosed).
28. If Council of the City adopts a bylaw to suspend the Service, the City must give the Band a notice of suspension and the suspension will commence 60 days after the Band's receipt of the notice of suspension and suspension will continue until such time as the Band cures the default.
29. Notwithstanding sections 22 and 26, if the nature of the Band's default is such that the City considers it does or may threaten the health or safety of persons or property, then the notice period is 7 days and the suspension will commence 7 days after the Band's receipt of the notice of suspension.

Effect of Suspension

30. Because the City will be staffing, operating, maintaining and repairing its engineering and public works departments with the capacity required to fulfill this Agreement and in contemplation that a suspended Service may at any time be immediately required to be provided again to the Band, suspension of the Service does not relieve the Band from paying the Service Fee payable under this Agreement.

Termination

31. If the City has suspended provision of the Service under this Agreement and the suspension has continued for more than six months, the City may give at least 60 days' notice to the Band that the Council of the City will be considering adoption of a bylaw to terminate the Service.
32. At the meeting of the Council of the City pursuant to the preceding section, the Band is entitled to appear before Council, including through legal representation, and to have copies of all information that the Council will be considering (other than privileged information and other information that must not, by law, be disclosed).
33. If Council of the City adopts a bylaw to terminate the Service the City must give the Band a notice of termination and the termination will come into effect on that date which is one year after the date the Band receives the notice of termination.

Effect of Termination

34. After the time the City gives the Band a notice of termination, the Band may cure a default and cause a suspended Service to be re-supplied.
35. Any unpaid monies owing by the Band to the City remain payable despite any termination under this Agreement.

Supply of Service After Termination

36. Nothing in this Agreement requires the City to continue to provide the Service after termination of this Agreement, but if the City chooses, upon request by the Band or by court order, to provide the Service, the Band must pay the then-current Service Fee plus an additional 35% to reflect the disruption to and uncertainty of the City's staffing, engineering, financing and other arrangements, plans and systems.

Band Acknowledgement of Fairness

37. The Band acknowledges that the time frames and processes for suspension and termination of the Service as outlined in this Agreement are fair and reasonable and the Band will not challenge, in a court of law or otherwise, any suspension or termination of the Service undertaken pursuant to this Agreement.

PART 4 - MISCELLANEOUS CLAUSES**Release**

38. The Band hereby releases the City and its elected and appointed officials, officers, employees, volunteers, agents, servants, and contractors (the "City Representatives") from all claims and demands that the Band now has or may at any time in the future have against the City or any of the City Representatives in respect of any matter related to the Service or this Agreement or a matter within the scope of this Agreement UNLESS the claim or demand is related only to death, bodily injury, property loss or property damage caused solely and directly by the gross negligence of the City or any of the City Representatives.

This release survives expiry or earlier termination of this Agreement.

Indemnity

39. The Band hereby indemnifies and saves harmless the City and the City Representatives from and against all claims, demands, actions, causes of action, proceedings, suits, losses (including economic and consequential losses), damages, costs (including actual costs of lawyers and other professional advisors), fines, penalties, charges, expenses and other harm of whatsoever nature, both direct and indirect, no matter when or how arising, brought by any person (including members of the Band and other persons occupying the Reserve) whether or not related to death, bodily injury, property loss, property damage or other loss or damage, suffered by the City or any of the City Representatives, which result from or are connected with:

- (a) the City's provision or failure to provide the Service;
- (b) any breach or default of the Band under this Agreement;
- (c) any wilful act, omission, misconduct or negligence of the Band or its members, Council members, officials, employees, servants, agents, tenants, subtenants, licensees, invitees, contractors, subcontractors or any other non-City person on the Reserve or for whom the Band is responsible;
- (d) a claim or demand by the Band under section 38 when neither the City nor any of the City Representatives was grossly negligent.

This indemnity survives expiry or earlier termination of this Agreement.



Band Council Meeting

40. The Band represents and warrants to the City that it is authorized to enter into and carry out this Agreement and this Agreement was authorized with the consent of a majority of the Councillors of the Band present at a duly convened meeting of the Council and the persons executing it on behalf of the Band were duly authorized to do so.

Band Bylaws

41. The Band confirms to the City that nothing in this Agreement is inconsistent with any currently applicable by-law made by the Band.

No Additional Services

42. Nothing contained in or implied by this Agreement requires the City to provide any additional services to the Band or to the Reserve other than that specifically identified in this Agreement.
43. For clarity, nothing contained in or implied by this Agreement shall be interpreted as requiring the City to perform building inspection services in respect of the building on the Service Area, and the Band specifically acknowledges and agrees that no such services are being offered or provided by the City in conjunction with this Agreement.

Band's Arrangement with Reserve Occupants

44. The Band must not enter into any contract with a resident or other occupant of the Reserve, or make a promise to any resident or occupant of the Reserve, regarding sewage disposal that is inconsistent with the terms and limitations of this Agreement.

Service Interruptions

45. If the City anticipates there will be any stoppage or interruption or reduction in the Service for any reason whatsoever, the City must attempt to give at least three (3) days' notice to the Band except in the case of an emergency, in which case the City must notify the Band as soon as possible.

Assignment

46. The Band is not entitled to assign this Agreement to any person, except that where the Band amalgamates with another band or is divided so as to constitute new bands, in which cases this Agreement will terminate and the City agrees, upon receipt of \$2000 as a contribution to its costs, to enter into a new agreement or agreements on substantially the same terms with the amalgamated band or the new band(s), as the case may be.



47. The City may assign its rights and obligations under this Agreement, in whole or in part, to any local government, public authority or other person who provides sanitary sewer services within the boundaries of the City.

Surrender of Reserve

48. The Band must immediately give notice to the City if any part of the Reserve or Service Area is or is proposed to be surrendered to Her Majesty or designated under sections 37 through 41 of the *Indian Act* or if any land is or is proposed to be added to the Reserve or Service Area.

No Other Bands

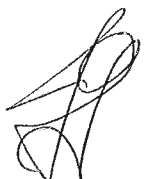
49. The Band confirms to the City that there are no other bands, within the meaning of the *Indian Act* and its regulations, for whom the Reserve has been set aside for their use and benefit.

Payment of Amounts Owning

50. Unless otherwise provided in this Agreement, all amounts payable by the Band to the City must be paid within 30 days of receipt of an invoice from the City. Late payments will be assessed interest at the rate of 15% per month (18% per annum), or such other amount as the City may charge in respect of similar accounts from time to time.

Notices

51. All notices to be given under this Agreement must be in writing and may be delivered by hand, sent by facsimile transmission, or mailed by first-class prepaid registered mail.
52. Any notice delivered by hand or sent by facsimile transmission is deemed to be given and received on the day it is sent. Any notice mailed is deemed to be given and received on the fourth day after it is posted (unless there is a mail strike, slow down or other labour dispute which might affect delivery, in which case the notice will be effective only if actually delivered).
53. Notwithstanding the two preceding sections, in the event of a situation that the City perceives to be an emergency, the City may give telephone notice to the Band's Director of Operations, with written notice to follow as soon as possible. The Band must at all times provide the City with the names and telephone numbers of all persons authorized to accept emergency notices for the purposes of this section.
54. Notices must be addressed to the addresses or facsimile numbers on page 1 or to such other address or facsimile number as may from time to time be advised by a party in writing.
55. Notices to the City must be addressed to the attention of the "Corporate Officer".



Tenures

- 56. The Band must, if required by the City, assist the City in securing any tenure at no charge that the City may require from the Minister of Indian Affairs and Northern Development in regards to the City's rights or obligations under this Agreement.

Powers Preserved

- 57. Nothing contained in or implied by this Agreement prejudices or affects the rights and powers of the City in the exercise of its functions under any public or private statute, bylaw, order or regulation, all of which may be fully and effectively exercised in relation to the Service, to the extent they are applicable to the Reserve, as if this Agreement had not been executed and delivered.
- 58. Nothing contained in or implied by this Agreement prejudices or affects the rights and powers of the Band in the exercise of its functions under any public or private statute, bylaw, order or regulation, all of which may be fully and effectively exercised as if this Agreement had not been executed and delivered.

Implied Amendments

- 59. The Band acknowledges that the City is subject to the *Community Charter*, the *Local Government Act* and other statutory restrictions and requirements and this Agreement will impliedly be modified to the extent necessary for the City at all times to comply with all statutory restrictions and requirements.

Relationship

- 60. Nothing in this Agreement is to be interpreted as creating an agency, partnership or joint ventureship between the City and the Band.

Time

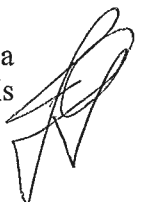
- 61. Time is of the essence of this Agreement.

Remedies not Exclusive

- 62. No reference to or exercise of any specific right or remedy by the City prejudices or precludes the City from any other remedy, whether allowed at law or in equity or expressly provided for herein.

Headings

- 63. The headings appearing in this Agreement have been inserted for reference and as a matter of convenience and in no way define, limit or enlarge the scope or meaning of this Agreement or any provision of it.



Waiver

64. An alleged waiver of any breach of this Agreement is effective only if it is an express waiver in writing of the breach in respect of which the waiver is asserted. A waiver of a breach of this Agreement does not operate as a waiver of any other breach of this Agreement.

Interpretation

65. Wherever the singular or masculine or neuter is used in this Agreement, the same will be construed as meaning the plural, the feminine or body corporate where the context or the parties so require.

Enurement

66. This Agreement enures to the benefit of and is binding upon the parties and their respective successors.

Statutory References

67. A reference in this Agreement to a statute includes regulations made pursuant to it and includes all amendments and replacements to them from time to time.

Modifications

68. No amendment or modification of any of the terms or provisions of this Agreement will be of any force or effect unless the amendment or modification is in writing and duly executed by the City and the Band.

Governing Law

69. This Agreement will be governed by and interpreted in accordance with the laws of British Columbia or, to the extent that matters of paramount federal jurisdiction are involved, the laws of Canada.

Disclosure of Documents

70. The Band acknowledges that the City may need to disclose this Agreement and related materials pursuant to its obligations under statute, including the British Columbia *Freedom of Information and Protection of Privacy Act* and the *Community Charter*.

Schedules

71. The following schedules are incorporated into this Agreement:
Schedule "A" – Reserve
Schedule "B" – Service Area



Schedule "C"—Sewer Connection Area #32

As evidence of their agreement to be bound by the terms of this Agreement, the parties have executed this Agreement on the dates written below.

DATED the ___ day of _____, 2010

Executed by the CITY OF KELOWNA)
by its authorized signatories:)
)
)
_____)
Mayor: Sharon Shepherd)
)
)
_____)
City Clerk: Stephen Fleming)
)
)
)

DATED the ___ day of _____, 2010

Executed by the DULY CONSTITUTED)
COUNCIL of THE OKANAGAN)
INDIAN BAND in the presence of:)
)
Sam Galinas)
Name:)
)
11505 WESTSIDE ROAD)
Address:)
)
MANAGER COMMUNITY DEVELOPMENT)
Occupation:)
)
(as to all signatures))

Fabian Alexis
Chief Fabian Alexis

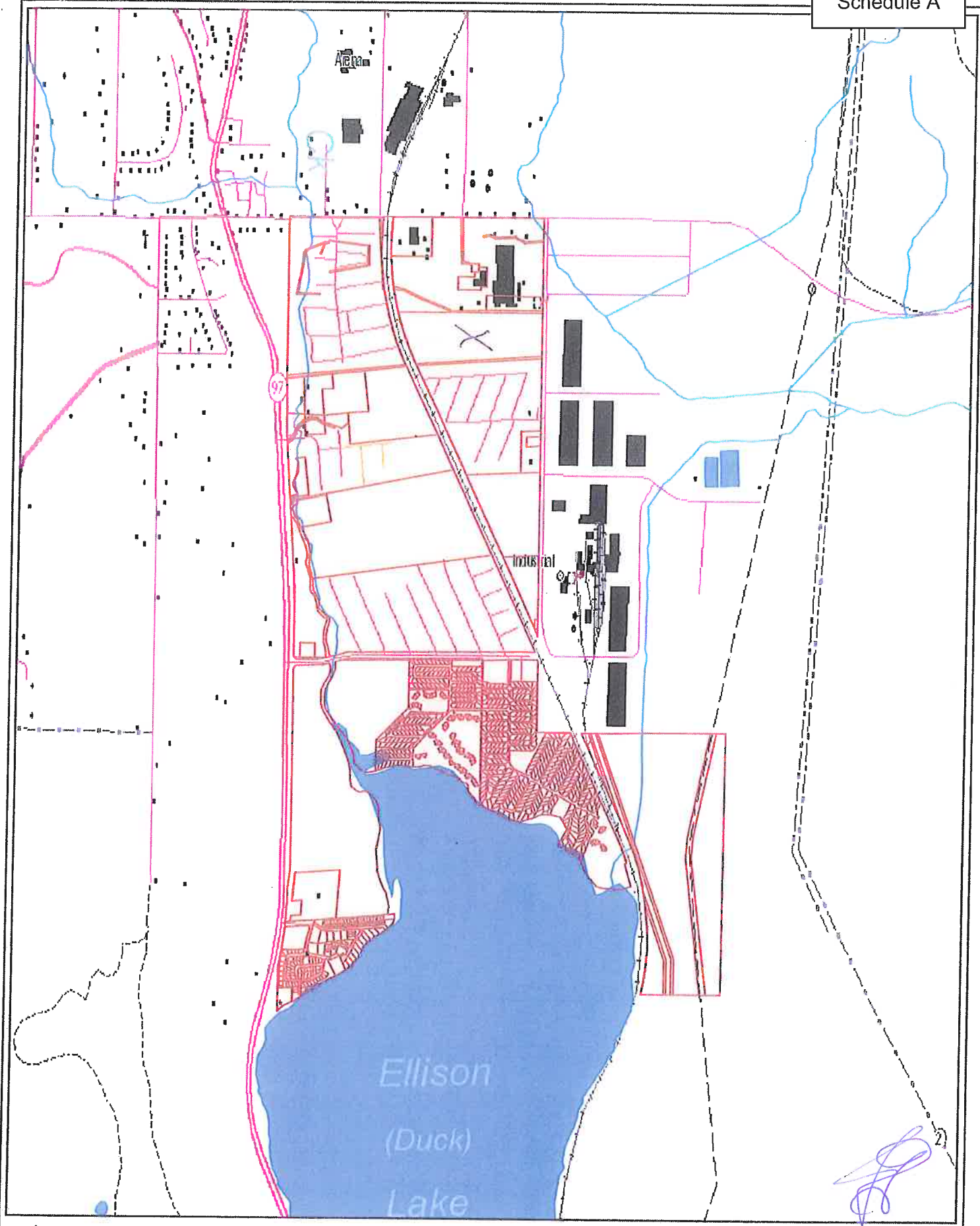
Will Sh.
Councillor

Diane Lavis
Councillor

Rob Lochman
Councillor

Schedule "A"
Reserve

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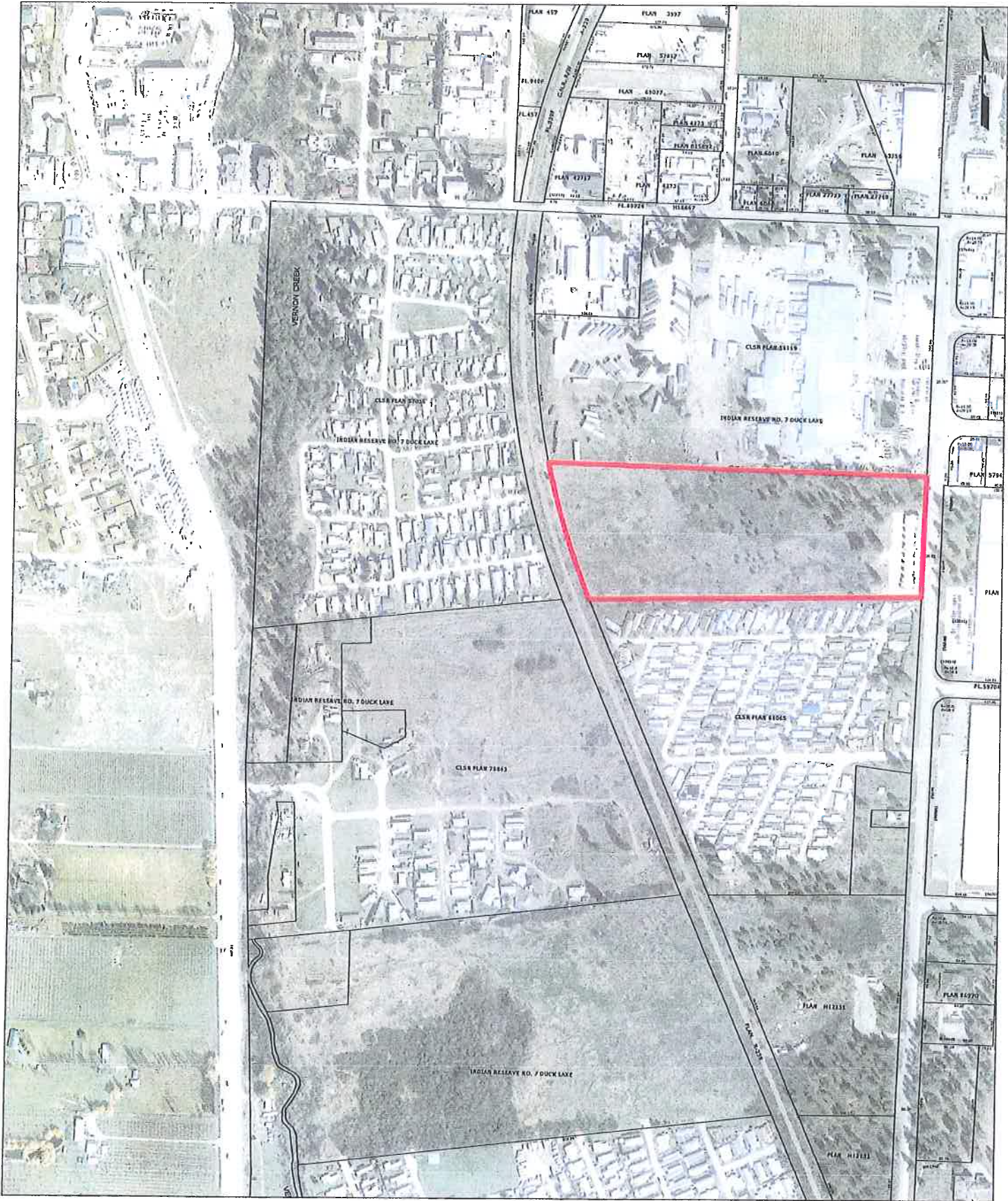
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Duck Lake I.R. # 7

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**Schedule "B"
Service Area**





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Schedule "C"
Sewer Connection Area #32

END OF AGREEMENT

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BL9168 added Map D – North End Industrial Sewer Service Connection Area #32 as follows:

MAP D

