Memorandum

To: **The File.**
From: **Fred W. Finlinson**
Subject: **1992 Ad Hoc Working Group/ Surplus Water Contracts**
Date: **May 14, 2018**

"History not remembered, tends to repeat itself." Many of the current issues that the water community is struggling with during the 2018 Interim were studied 26 years ago by the 1992 Interim Natural Resource Committee. In the General Session of the 1992 Legislature, two bills were introduced extending jurisdiction to the Public Service Commission to review the rates charged by Municipalities to customers living outside their boundaries. Senator Scott Howell was the sponsor of SB 158, Jurisdiction of Public Service Commission. The Bill was referred to the 1992 Standing Senate Judiciary Committee. After the bill's hearing, the Committee recommended that the bill be referred to interim study. The Committee Report was adopted by the Senate on February 17, 1992. A similar bill, HB 323 was also introduced by Rep. Kurt Oscarson. It failed as well. Both Senator Howell and Representative Oscarson represent areas served by "surplus water contracts" from Salt Lake City. The 1992 Master Study Resolution contained the following resolution, "To study whether the Public Service Commission should regulate surplus water sales of cities and towns." #105, The Master Study Resolution, SJR #18, Laws of Utah – 1992.

The study was assigned by Legislative Management Committee to the Interim Natural Resource Committee. On the 17th of June, an ad hoc working group was asked to study issues related to "Surplus Water Contracts." The minutes of the Committee do not indicate who was appointed to be on the working group, but interested stakeholders were invited to meet to discuss options. On October 21, 1992, the Senate Chairman (Senator Finlinson) reported to the interim Natural Resource Committee that the Surplus Working Group had discussed the following concepts:

1. State Engineer review of any surplus water contract terminated or with reduced delivery of water. The City would have to receive approval from the State Engineer to terminate surplus water contracts.
2. The extension of Public Service Commission jurisdiction to review surplus water contract rates.
3. Water Advisory Councils with representation from those receiving surplus water.
4. The Responsibility of Counties to provide the capacity necessary for public safety fire flows.
5. The State's Role in developing fire-flow standards for public safety.

The Working Group continued to meet and finally reported at the December 16, 1992 meeting of the Interim Natural Resource Committee that although the working group "worked hard on this issue but was not able to resolve it." No legislation was prepared for submission to the 1993 General Session on the subject. The 1992 Interim Committee Report, Reference Bulletin #14, Report for the 1993 General Session summarized the interim work on Surplus Water Contracts, pages 64 & 65 as follows: "In the 1992 General Session, legislation was introduced to extend the jurisdiction of the Public Service Commission (PSC) to retail water sales of municipalities to customers outside municipal boundaries. Title 10, "Utah Municipal Code," allows municipalities to sell water that is surplus to the needs of its citizens to others outside municipal limits. The code restricts municipalities to the sale of surplus water only, because Article XI, Section 6 of the Utah State Constitution prohibits municipalities from alienating their water rights and requires municipalities to preserve their water supplies for their inhabitants."

The Report also noted, "The sale of surplus water to customers outside municipal boundaries is a common and widespread practice in the state. A survey conducted by the Utah League of Cities and Towns revealed that at least 107 municipalities provide retail water service to customers outside their corporate limits. In Salt Lake County, approximately 120,000 residents within the unincorporated area of the county are dependent upon surplus water sales of Salt Lake City."

The Report provided additional background information by noting Arguments for and against PSC rate setting jurisdiction.

For	Against
Customers outside city boundaries have no influence in the setting of rates or quality of service. Rates charged customers outside municipal limits are often arbitrarily determined.	Article XI, Section 5, Utah State Constitution, prohibits the legislature from delegating to any special commission the power to supervise any municipal function. (Note: This section also talks about Charter Cities. While most cities are not charter cities, this concept supports the existing provisions of the Title 10, the Municipal Code.)
Customers outside municipal limits have no guarantee of a permanent water supply.	Article XI, Section 6, Utah State Constitution, prohibits municipalities from alienating their water rights and requires municipalities to preserve their water supplies for their inhabitants.
	If the PSC lowers water rates of surplus customers, water rates of customers within municipal boundaries may have to be increased.
	The cost of regulation will make water rates go up.

The Report further summarized the working groups efforts, "The committee chairman agreed to organize an "ad hoc" group composed of municipal officials and surplus water customers to resolve some of the concerns of the surplus water users. The group developed and discussed several draft bills that addressed concerns for secure water supplies and equitable water rates while avoiding constitutional conflicts. A consensus could not be reached, however, on any measure, so proposed legislation was not submitted to the committee." No legislation was introduced in the 1993 General Session of the subject matter of "Surplus Water Contracts, or in subsequent years until the 2018 General Session with the introduction of HB 124 by Representative Coleman, which did not pass. The matter has once more been assigned to Interim Study.

I can remember one of the sessions of the working group was focused on the differential in price between residents and non-resident patrons. LeRoy Hooton, the then current director of Public Utilities for Salt Lake City reported that studies had been conducted and the amount of tax that resident patrons paid was equal to about .5% of the then current rate for water. Based on these studies, Salt Lake City priced surplus water at 1.5 times the existing water rate schedule for city patrons. With the additional surcharge making up for the fact that non-residents did not pay property taxes to Salt Lake City, the City was charging the same price for water to residents and surplus water users. With this fact established, the work group did not recommend any change based on pricing differential. In 1997, the Utah Supreme Court in the case of Platt v. Town of Torrey, 331 Utah Adv. 3, 949 P.2nd 325, 1997 Utah LEXIS

101, (Utah 1997), weighed in on the price differential between resident and nonresidents. The court held "municipalities must deal reasonably with nonresidents as they do with their own residents in the sale of water; thus, a showing by nonresidents contesting a rate schedule that rate discrimination rests solely on nonresident status, without some other legitimate justification, will invalidate the schedule."

In retrospect, the 1992 Working group's failure to resolve the surplus water contract issue was the result of conflicting public policies on how the citizens of the state can utilize the water vested in Municipalities. All water rights may be transferred without restriction as long as there is a hydrological connection, except municipal water rights. The Legislature did not want to create "water hoarding" in the administration of the public's water. As Municipalities annex, the new citizens annexed gain a right to the use of the water rights vested in Municipalities. This use by the newly annexed residents constitutes "beneficial use" which protects the municipal water rights against forfeiture. In the event of no annexation, municipalities are authorized in Title 10 to enter into Surplus Water Contracts with people living outside the boundaries of a city. The use of the surplus water also protects the municipal water right from forfeiture. Both annexation and surplus water contracts are valid methods of sharing water with new customers and prevent unnecessary hoarding. The Utah Supreme Court has ruled that municipalities are subject to forfeiture for non-use which has been determined to not violate the alienation restriction of Article XI, Section 6. Nephi City v. Hansen, 779 P.2nd 673 (Utah 1989). Protection from Legislative review or special commission is granted to Charter Cities by Article XI, Section 5. The Municipal Code, Title 10, currently does not allow special commissions to regulate the authority granted to cities. The 1992 attempts to have surplus water contracts reviewed by either the Public Service Commission, the State Engineer, or a newly created Advisory Group with non-municipal citizens ran counter to these public policies.

It is interesting that the provision restricting a city's ability to alienate its water rights is found in Article XI, Section 6, and not in Article XVII, Water Rights. The Water Right Article simply provides "All existing rights to the use of any of the waters in this State for any useful or beneficial purpose, are hereby recognized and confirmed." The Utah Constitutional Convention included as one of its standing committees, Water and Irrigation. A lot of topics about water were referred to the standing committee, but they were not included in the Constitution. Later many of these water concepts were included in the code, such as: "All waters in this state, whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof. UCA 73-1-1. "Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state." UCA 73-1-3. The concept of "forfeiture" and "use it or lose it" was established. UCA 73-1-4. "The use of water for beneficial use, as provided in this title, is hereby declared a public use." UCA 73-1-5. Eminent Domain was provided in UCA 73-1-6. In a way, the same thing happened on the Local Government side. The constitution prevented cities from alienating water rights, Article XI, Section 6, but the Legislature allowed Cities the right to sell surplus water in UCA 10-8-14(d).

It is surprising that we don't have any information about why the constitutional restriction was placed in the Article XI, Section 6, beyond the fact that this was not a water community issue, it was a restriction on the operation of municipalities, and it was not applied to any other water user.

While legislation was not produced as a result of the 1992 Interim Surplus Water Sales study, a lot of good came out of the discussion. Since 1896, and for the last 26 years, municipalities have shared (via surplus water contracts and annexation) water with residents not living in their boundaries. Salt Lake City states that it has not canceled a surplus water contract, while still claiming the right to cancel the contract if the water is needed by the City for its inhabitants. The Report indicated that the practice

was wide spread; in 1992 107 different municipalities were sharing water with surplus water sales. The area formerly represented by Senator Howell, Senator Finlinson and Rep. Oscarson has now reached almost full build out. The population of 120,000 in 1992 has increased significantly because water has been made available for development of the formerly unincorporated county. Much of the area supplied by Salt Lake City surplus water contracts in 1992 is now included in the Cities of Holladay, Murray and Cottonwood Heights; however, the residents are still served by the Salt Lake City Surplus Water Contracts. The Surplus Water Contract has worked well.