



# State of Utah

## DEPARTMENT OF NATURAL RESOURCES

MICHAEL R. STYLER  
*Executive Director*

To: Brian Allred

From: Michael R. Styler

Re: Legislative Reports for Utah Water Taskforce Subcommittees

Date: September 27, 2018

These are the reports due by October 1 from the Utah Water Taskforce Subcommittees. It also includes proposed legislation that was voted to recommend to the Legislature. The reports are due by the end of the month. Mike and the chairs will be available for questions and to provide any additional information at the October meeting of the Standing Committee.

The subcommittees and their chairs are as follows:

Constitutional Committee	Steve Clyde
Extraterritorial Committee	Marie Owens
Private Property Committee	Wendy Fisher
Water Supply & Water Surplus Committee	Boyd Clayton

## Constitutional Committee Report

The study committee was formed to consider Amending Art XI, Sec. 6 of the Constitution of Utah. As this provision was originally drafted and included in the 1896 Constitution, it prohibited municipalities from directly or indirectly parting with title to any water rights, water works or sources of water supply. Water rights, sources of water supply and water works were to be preserved and maintained by the municipality to supply its inhabitants with water at reasonable charges. However, the Constitution did allow a municipality to exchange water rights, water works or sources of supply for similar assets of equal value.

Utah Code Sec. 10-8-14 was adopted to allow municipalities to sell the commodity of water, as opposed to water rights, to others that was currently surplus to the needs of the municipalities. Based on this statutory authorization, many municipalities have extended their water system infrastructure to areas outside their political boundaries and have provided retail water service. For all practical purposes, that service has been viewed as a firm commitment, but there has always hung over the heads of these out of boundary customers the risk of surplus water being called by the municipality to meet the needs of its citizens, as mandated by the Constitution.

A second situation also developed where certain municipalities allowed its water rights to be used by people under contract in areas where the municipalities did not have water infrastructure or the ability to actually provide retail service. Those contracts again are for surplus water only, and to conform with the Constitutional prohibition, are subject to termination.

The theoretic tentative nature of out of boundary sales of water have caused concern among some people, leading to the effort to amend Art. XI, Sec. 6 during last general session.

The study committee has spent literally 100's of hours in very constructive discussion and that effort has led to the attached draft amendment language that was unanimously approved and recommended by the Utah Water Task Force at its meeting on September 25th. The draft has also received the support of the Utah League of Cities and Towns by formal Resolution 2018-002, adopted by the League's members on September 11th. A copy of the Resolution is also attached.

The central provision of proposed amendment:

- o Retains the Constitutional restriction on municipalities disposing of water rights or sources of water supply. Water rights and sources are to be retained for supplying municipalities designated service area at reasonable rates.
- o Removed restriction from selling or transferring water works, but allows such a transfer only to another public water supplier.
- o Each municipality may define by ordinance its designated water service area (which may include lands outside of corporate boundaries) and the terms of service.
- o Municipalities may:
  - . Contractually commit water currently in excess of the needs of its designated service area for use outside its designated service area.
  - . Supply the commodity of water to retail customers within its designated service area at reasonable rates established by ordinance.
  - . Retained authority to exchange water rights or sources of water supply for other water rights or sources of water supply of equal value in meeting municipality's needs and devoted to public supply of designated service area.

Requiring that the designated service area as well as water rates be established by ordinance, provides a more formal process where there is notice and opportunity for the public being served with water by the municipality, to appear and participate in this process, and as a legislative act of the municipality, it requires equal protection under the law.

The policies set forth in the Constitutional provision will then be implemented by statute.

**Resolution 2018-002**

***(A) Resolution about proposed changes to the Utah State Constitution about municipal authority over water rights and water supply***

***(B) We, the members of the Utah League of Cities and Towns find:***

Whereas, water is a precious, finite, and irreplaceable resource essential to the wellbeing of all residents and to the economic vitality of the state; and

Whereas, cities and towns who operate culinary water systems are responsible for ensuring that residents have access to sufficient water supplies; and

Whereas, cities and towns that supply culinary water directly to end users are responsible for setting reasonable rates for the water usage; and

Whereas, the Utah State Legislature in 2018 passed a resolution assigning the Natural Resources, Agriculture and Environment Interim Committee to consider a proposal to amend the Utah Constitution Article 11 Section 6, which forbids municipalities from selling waterworks or water rights; and

Whereas, the Director of the Utah Department of Natural Resources appointed members to four study groups to study and make recommendations to the Legislature on a variety of water issues; and

Whereas, the Constitutional Amendment study group, which included members of the Utah League of Cities and Towns, has drafted a proposed amendment to Article 11 Section 6 of the Utah Constitution; and

Whereas, the proposed amendment has achieved consensus by all members of the study group and is attached hereto; and

Whereas, the surplus water study group, which included members of the Utah League of Cities and Towns, is working on companion legislation to the proposed amendment to provide additional clarity to retail service outside of a town or city boundary.

***(C) THEREFORE, we, the members of the ULCT resolve that:***

1. Utah cities and towns support the attached proposed amendment to Article 11 Section 6 of the Utah State Constitution.
2. Utah cities and towns support the narrow ability for a municipality to convey waterworks to another governmental entity that is a public water supplier.
3. Utah cities and towns support equal protection for all water customers within a designated water service area established by a municipality.

4. Utah cities and towns support increased transparency and opportunities for public input regarding retail water rates in a designated water service area.
5. Utah cities and towns oppose any state effort to oversee or regulate the municipal legislative responsibility of setting water rates or the designation of designated water service areas.
6. Utah cities and towns support the continued ability of municipalities to protect all of their sources of culinary water from contamination.

Submitted by:

ULCT Board of Directors

September 11, 2018

# **Legislative Report and Proposal on Utah State Statute 10-8-15 Extraterritorial Jurisdiction**

**September 25, 2018 Draft**

There were several bills ran during the 2018 Utah Legislative Session relating to long-standing water laws. These issues are complex and the legislature asked that the Director of the Division of Natural Resources (DNR) set up workgroups to evaluate some of the more contentious items that these bills identified. One of these workgroups was asked to specifically examine Statute 10-8-15. This is a three-sentence statute, commonly referred to as Extraterritorial Jurisdiction.

The members of this workgroup were selected by the Director of DNR and consisted of representatives from a variety of vested stakeholders. The committee members were: State Representative Michael Noel; Brad Barber, Utah Open Lands; Fred Finlinson, Prep60 Districts; Teresa Gray, Salt Lake County Health Department; Nathan Bracken, Smith Hartvigsen; Greg Todd, Duchesne County; Mike Davis, Wasatch County; Evan Curtis, GOMB; Norm Henderson, private land owner; Keith Broadhead, Utah League of Cities and Towns; and Marie Owens, Division of Drinking Water as the chair.

The entire workgroup met nine times from May through September to inventory the various concerns with the existing statute and its implementation over the years. The workgroup also spent several hours discussing features of the statute that are important to maintain if any changes were made. The initial meetings were devoted to building a better understanding of the statute, intended purpose, and interpretations. There were nearly 40 attendees at each of the scheduled meetings. In addition, there were a few smaller focus groups that met separately to draft potential language for review by the larger group. Countless hours have been spent by dozens of passionate water professionals to work through these complex issues. This has been a difficult and productive process and is a good model of how Utah policy makers can work through tough issues with respect and cooperation to find solutions.

The first task was a detailed and thorough review of the existing statute language. Extraterritorial Jurisdiction can be summarized into the following points:

- Grant all municipalities the authority to build and protect culinary and domestic water infrastructure inside or outside their political boundaries (ie. city limits).
- Grant all municipalities the authority to operate their water infrastructure and protect that infrastructure and the water sources from damage, pollution, or contamination.
- Grant all municipalities the authority to enact ordinances necessary to prevent pollution or contamination of water sources.
- Grant all municipalities the authority to prohibit or regulate the construction or maintenance of outhouses and septic tanks in the area of jurisdiction.

- Jurisdiction area for all municipalities is 15 miles upstream of the point of diversion and 300 feet on either side of the stream, including, if present, a highway.
- Cities of the first class (population over 100,000) have the additional jurisdictional area of the entire watershed.
- Cities of the first class have the additional requirement to allow grazing beyond 1000 feet of the stream and provide highway access that cannot be closed to the transport of livestock.

There was a significant amount of time hearing concerns over Extraterritorial Jurisdiction being used to limit the transfer of water rights or to engage in general land use planning. It is clear that these two issues are not authorized by this statute, nor was it within the scope of this workgroup to address these concerns through changes to this particular section of the Utah Code.

The workgroup inventoried the following items deemed critical to maintain in the existing statute. These items have been used as outside limits to the recommendations for change. They also provided the first points of consensus for the group to build agreement upon. These items of agreed preservation are:

- Ensure the continued priority for the protection of public health;
- Ensure the continued protection against degradation of existing public drinking water supplies;
- Ensure that municipalities are not prohibited from securing their infrastructure;
- Ensure that municipalities continue to have the authority to fulfill the regulatory requirements placed on them for water quality and source protection for which they have particular obligation and liability;
- Maintain the ability for communities to plan for population or economic growth; and
- Ensure that new hardships on agriculture are not created.

The group then began to evaluate the list of issues that arose during the discussions. They organized all of the issues into the following four categories: 1) what are the definitions of pollution and contamination, 2) what are the boundaries of how far extraterritorial jurisdiction can extend geographically, 3) what does "jurisdiction" mean particularly when there are overlapping jurisdictions, and 4) are the authorities and limits currently defined appropriate? The workgroup recognized that they may not be able to find consensus on all of the issues identified within the time allotted. However, the workgroup agreed on prioritizing the issues and found consensus on the attached recommended language changes to Statute 10-8-15.

Although the recommended changes to the statute do not reflect a new definition for pollution and contamination, the group discussed this in depth and unanimously decided that it should not be changed in this statute. These terms are defined in various state rules and county policies, and the workgroup felt that would be difficult to keep these definitions aligned if there was a separate definition in the State Code.

The additional language proposed represents a compromise reached to address concerns about cities of the first class being able to exert Extraterritorial Jurisdiction to watersheds feeding the watershed that they take their water from. The intent is to limit the additional Extraterritorial Jurisdiction granted to cities of the first class to just within their own county, unless they enter into written agreements with

the other municipalities and counties that also have jurisdiction. The intent was also for this limitation to not apply to the basic extraterritorial jurisdiction created for all municipalities to protect 15 mile upstream and 300 feet surrounding their intake.

The proposed language also addresses concerns over ensuring a public comment period that includes all interested stakeholders (particularly those that reside outside the municipal political limits) for proposed ordinances enacting extraterritorial jurisdiction. The intent was to make sure that all stakeholders were notified and allowed to speak on an ordinance that may impact them while maintaining the municipalities' authority to manage their liability to fulfill their unique obligation to protect and ensure their drinking water.

The suggested changes were unanimously agreed on as sufficiently addressing most of the issues identified on boundaries and jurisdiction, with the exceptions identified below.

The following items were identified as possibly needing clarification or changes in order to reduce the possibility of requiring litigation to resolve. However, the workgroup determined that these were not prioritized for resolution at this time.

- Create additional representation for stakeholders beyond their local municipality and county.
- Expand applicability of this statute to all public water systems as opposed to limiting to municipalities only. There are 1,000 statewide public water systems, 500 of which serve residential communities, versus only 253 municipalities for which this statute applies.
- Change the Extraterritorial Jurisdiction area definition to be more customized for the specific need rather than the 15 mile upstream and 300 foot on either side delineation for all sources.
- Address how Extraterritorial Jurisdiction is applied on Federal lands.

This effort resulted in a vetted and approved proposal for changes to Title 10-8-15 as shown in the following redlined document.



**10-8-15. Waterworks -- Construction -- Extraterritorial jurisdiction.**

(1) ~~They~~ municipalities may construct or authorize the construction of waterworks within or without ~~their~~ the city limits, and for the purpose of maintaining and protecting the same from injury and the water from pollution their jurisdiction shall extend over the territory occupied by such works, and over all reservoirs, streams, canals, ditches, pipes and drains used in and necessary for the construction, maintenance and operation of the same, and over the stream or other source from which the water is taken, for 15 miles above the point from which it is taken and for a distance of 300 feet on each side of such stream and over highways along such stream or watercourse within said 15 miles and said 300 feet.

(2) The jurisdiction of cities of the first class shall additionally be over the entire watershed within the county of origin of the city of first class and as provided in Subsection (4); ~~except provided~~ that livestock shall be permitted to graze beyond 1,000 feet from any such stream or source; and provided further, that each city of the first class shall provide a highway in and through its corporate limits, and so far as its jurisdiction extends, which may not be closed to cattle, horses, sheep, ~~or~~ hogs, or goats driven through any such city, or through any territory adjacent thereto over which such city has jurisdiction, but the board of commissioners of such city may enact ordinances placing under police regulations the manner of driving such cattle, sheep, horses, ~~and~~ hogs, or goats through such city, or any territory adjacent thereto over which it has jurisdiction.

(3) ~~They~~ Municipalities may enact all ordinances and regulations necessary to carry the power herein conferred into effect, and are authorized and empowered to enact ordinances preventing pollution or contamination of the streams or watercourses from which the inhabitants of ~~cities~~ municipalities derive their water supply, in whole or in part, for domestic and culinary purposes, and may enact ordinances prohibiting or regulating the construction or maintenance of any closet, privy, outhouse or urinal within the area over which the ~~city~~ municipality has jurisdiction, and provide for permits for the construction and maintenance of the same. In granting such permits ~~they~~ municipalities may annex thereto such reasonable conditions and requirements for the protection of the public health as they deem proper, and may, if deemed advisable, require that all closets, privies and urinals along such streams shall be provided with effective septic tanks or other germ-destroying instrumentalities.

(4) Cities of the first class may only exercise extraterritorial jurisdiction outside of their county of origin under Subsection (2) pursuant to a written agreement with municipalities and counties that have jurisdiction over the area where the watershed is located.

(5) (a) As used in this Subsection (5) "affected entity" means:

(i) a county who has land use authority over land subject to an ordinance or regulation described in this section;

(ii) a local health department as that term is defined in Section 26A-1-102 who has jurisdiction pursuant to Section 26A-1-108 over land subject to an ordinance or regulation described in this section;

(iii) a municipality who has enacted, or could enact, an ordinance or regulation described in this section over the land subject to an ordinance or regulation described in this section; and

(iv) a municipality who has land use authority over land subject to an ordinance or regulation described in this section

(b) For any proposal to adopt an ordinance or regulation under the authority of this section after July 1, 2019, the legislative body shall:

(i) hold a public hearing; and

(ii) give notice of the date, place, and time of the hearing, as provided in Subsection

(5)(c).

(c) At least 10 days before the public hearing under Subsection (5)(b)(i), the notice required under Subsection (5)(b)(ii) shall be:

(i) mailed to each affected entity;

(ii) mailed to the Director of the Division of Drinking Water;

(iii) mailed to the Director of the Division of Water Quality; and

(iv)

(A) published in a newspaper of general circulation in the county in which the land subject to the ordinance or regulation is located; and

(B) published on the Utah Public Notice Website created in Section 63F-1-701.

(d) An ordinance or regulation adopted under the authority of this section shall not conflict with existing federal or state statutes or rules for drinking water or water quality.

- 62 | (e) A municipality that enacts an ordinance or regulation under the authority of this section  
63 | shall:  
64 | (i) provide a copy to each affected entity; and  
65 | (ii) include a copy in its drinking water source protection plan.

# Executive Water Task Force, Private Property Task Committee

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21 September 2018 / Salt Lake City, UT

Resolving Public-Private Conflict Surrounding Salt Lake Valley Watersheds  
Report prepared by Utah Open Lands from meeting minutes

## REPORT

### RECOMMENDATION

1) To utilize the LeRay McAllister Critical Lands fund as an objective process to vet land acquisition projects brought forward by willing sellers through the allocation of \$2 million in funding designated specifically for the Wasatch Front Canyons stipulating the funds must be matched by other public and private funding sources. 2) To address increased recreational infrastructure needs through current available funding, an example being the Governor's Office of Outdoor Recreation. 3) To ensure that a component of the National Recreation Conservation Area legislation incorporates funding to adequately deal with recreational infrastructure needs and issues.

### SUMMARY

The committee requested initial information regarding watershed protection and land acquisition strategies. From the information provided to the committee three main areas of focus were identified as contributing to conflicts within the canyons regarding private property rights interests. These three main areas of focus were then further refined with goals and objectives. The three areas of focus were identified as: 1) Ensuring Watershed Protection for the general public; 2) Effectively dealing with Visitors to the Canyons; 3) Alleviating Private Property Conflict. The committee identified that a great deal of the conflict stems from the increased interest and use in public recreation in the canyons, the reliance on the canyon for watershed protection as contaminants can travel from the top of the watershed to the bottom in 7 hours during a storm event and finally the expectations of landowners regarding use, regulation and valuation of their property within the canyons. What the committee effectively determined is the need to balance these three main areas of focus as each intersect to create the overall conflicts for private interests in the canyons. Under each area of focus, the committee identified several goals and objectives aimed at resolving the conflicts associated with respective areas of focus. All goals and objectives are attached in Appendix A however the number one goal for each area of focus is provided as part of this summary.

1. Ensuring Watershed Protection
  - a. Goal: Protect watershed through acquisition of inholdings  
Objective: Identify funding sources  
Objective: Create new funding sources  
Objective: Acquisition protocol and methodology must be conservative and robust  
Objective: Non-governmental and local organizations provide matches
2. Effectively Dealing with Visitors in the Canyons
  - a. Goal: Develop adequate facilities for quality recreational experience  
Objective: Provide on-going funding to assist entity impacts  
Objective: Create interlocal cooperation

Objective: Identify what facilities are needed versus what facilities exist/function (toilets, transportation, trails, potable water)

Objective: NRCA should include funding for this infrastructure

3. Alleviate Private Property Conflicts

a. Goal: Protect the public trust by not creating private benefit

Objective: Establish criteria which rewards landowner contributions

Objective: Establish validity and checks/balances in land acquisition

Objective: Only dealing with willing sellers/willing buyers

Highlighted as critical in resolving private property right conflicts in the Canyons are the following agreed upon principles and considerations

- The subcommittee recognizes that unreasonable expectations will always result in conflicts where there are two opposing parties.
- Land acquisition is only one tool and there are privately owned lands that need to follow established paths to resolve regulatory conflicts without an overly costly or onerous process for landowners who could be considered grandfathered recognizing that there is legal precedent and established processes for this type of conflict resolution.
- The principles that we as a committee are in favor of are
  - Willing sellers, willing buyers
  - Regulations that strive to balance public health, welfare, safety, and environmental concerns with private property rights
  - Provide multiple paths for conflict solution
  - Encourage all parties involved in conflict to engage in collaborative process and explore outside expertise and resources.
- All areas of focus create conflicts in the canyons because of a lack of funding. The longer these conflicts go un-addressed, the more elevated they will continue to get.
- The LeRay McAllister fund could potentially provide a starting point for resolving the regulatory and acquisition conflicts up the canyons.
- Funds can be leveraged if other entities provide funding as well.
- Additional criteria specific to the challenges of landownership in the canyons and a fair process may need to be developed to adequately deal with conflicts (i.e. clear title, surveys of mining claims and determination of overlapping ownerships as well as mineral estate division and value).

## DISCUSSION

The final goal established by the committee:

- Protect Public Trust by not creating private benefit.
  - Establish criteria that rewards landowner contributions
  - Establish valid checks and balances in acquisition process
  - Assure long term protection of acquired lands
  - Stewardship funding

While funding is essential, the committee established that there are other things that need to be discussed in terms of conflict in the canyons. One example was the inherent risk associated with certain properties where now the expectation for a return on investment is unrealistic based on the true developability, encumbrances and associated infrastructure. The other type of private land conflict is one where the purchased land is already developed and additional regulations have created restricted use for the landowner. One example was stream setback increases.

Land acquisition was cited as a solution to compensate the above mentioned properties, but it would require establishing criteria to determine an appropriate approach for due-diligence as well as acknowledging unrealistic compensation expectations.

There are different levels of property ownership and rights within the canyon. Some properties are appropriate for an acquisition process, but there are others that are more suited for a process which acknowledges vested or entitled rights through the established venues and legal process. The cost of initiating legal action for those properties that demonstrate they are grandfathered could be a factor for some landowners and either a streamlined process or mediation might be deemed a satisfactory approach.

The LeRay McAllister Fund provides additional scrutiny to private property projects which is valuable. There is a long list of checks and balances with this fund and the committee feels this additional scrutiny is merited in dealing land acquisition conflicts in the canyon. The LeRay McAllister Fund was seen as a pilot or test case to be utilized to determine if that process can aid in resolving issues where landowners want to sell their property and not be in the canyon. The Le Ray McAllister Fund would allow for discrepancies in criteria to come to light. These discrepancies could then be addressed for further refinement of criteria and potential legislation.

## CONCLUSION

With the varied property interests in the canyons and the challenges that individual properties present, there is not a one-size-fits-all solution. Taking a few test case properties through an independent process (such as LeRay McAllister) will allow for issues in the process to come to the forefront, and allow them to be addressed and revised. This will also allow for greater transparency and fairness on both sides: the private right and the public trust.

The committee came to an understanding that unreasonable expectations will always result in conflict, and in this case it is important to deal with only willing sellers and willing buyers. Additionally, regulations on private property should balance private property rights with health, safety and environmental considerations. In conflict resolution, outside resources and expertise should be encouraged to participate, and multiple paths for conflict solution should be discussed. But fundamentally, an initial project or set of projects should be selected to further refine the process for resolution.

## APPENDIX A: GOALS AND OBJECTIVES

The following are the goals and objectives developed by the committee through the facilitated discussion around the topic of Ensuring Watershed Protection.

1. The following goal was ranked by the committee as the most important (based on number of votes):

- Goal: Protect watershed through acquisition of inholdings  
Objective: Identify funding sources  
  
Objective: Create new funding sources  
  
Objective: Acquisition protocol and methodology must be conservative and robust  
  
Objective: Non-governmental and local organizations providing matches

2. The following were ranked by the committee to be of secondary importance in dealing with watershed protection:

- Goal: Create funding opportunities for acquisition statewide  
Objective: Priority Cottonwood Canyons  
  
Objective: Solve lack of funding overall
- Goal: Ensure adequate and sustainable partnership of stakeholders  
Objective: Regulatory and funding cohesiveness
- Goal: Prevent contamination  
Objective: Review old regulations and look to update based on best technology/best practices  
  
Objective: Water Ombudsman to create cohesiveness over multiple jurisdictions (examples CWC and Provo River Watershed Council)
- Goal: Eliminate further cabin leakage  
Objective: Acquire undeveloped, developable land, provide an incentive for compliance with standards

3. The committee also came up with the following goals and objectives regarding watershed protection:

- Goal: Providing Adequate Toilets  
Objective: Government provide funding  
  
Objective: Not disconnecting current toilets from sewer system
- Goal: Create funding  
Objective: Create water shares for current toilets  
  
Objective: Use NRCA process to address needs
- Goal: Keep water as clean as it is today  
Objective: Convert to sewer, prohibit septic  
  
Objective: Sanitary facilities for recreational users

- Goal: Mitigate water quality impacts from development
- Goal: Mitigate recreational impacts and visitors  
Objective: Fund inholdings

The following are the goals and objectives developed by the committee through the facilitated discussion around the topic of recreational use was broadened to Effectively Dealing with Visitors in the Canyons.

1. The following goal was ranked by the committee as the most important (based on number of votes):

- Goal: Develop adequate facilities for quality recreational experience  
Objective: Provide on-going funding to assist entity impacts  
  
Objective: Create interlocal cooperation  
  
Objective: Identify what facilities are needed versus what facilities exist/function (toilets, transportation, trails, potable water)  
  
Objective: NRCA should include funding for this infrastructure
- Goal: Provide on-going funding to assist entity impacts  
Objective: Pay to play/limit use/user pays to educate about impacts and create ownership  
  
Objective: Interlocal source related to visitors

2. The following were ranked by the committee to be of secondary importance in dealing with visitors in the canyons:

- Goal: Deal with associated needs due to visitation, like road width and parking  
Objective: Limit use  
  
Objective: limit vehicles with shuttle/bus/other various solutions
- Goal: Fire suppression 21  
Objective: Funding for forest management  
  
Objective: Ensure fire management strategies are incorporated to NCRA and urban wilderness

3. The committee also came up with the following goals and objectives regarding visitors in the canyons:

- Goal: Multijurisdictional entity to address multiple impacts  
Objective: CWS and Provo River Watershed Council as examples  
  
Objective: Find multiple examples to draw from
- Goal: Identify carrying capacity of watershed  
Objective: limit visitation/toll/bus system/reservation system up to carrying capacity  
  
Objective: local determination of impacts and how to address them

Finally, the committee developed goals proposed to alleviate private property conflicts.

1. The following goal was ranked by the committee as the most important (based on number of votes):

- Goal: Protect the public trust by not creating private benefit  
Objective: Establish criteria which rewards landowner contributions



Objective: Establish validity and checks/balances in land acquisition

Objective: Deal with only willing buyers/willing sellers

- Goal: Assuring long-term protection of acquired lands  
Objective: funding for stewardship

2. The following were ranked by the committee to be of secondary importance in dealing with private property conflicts:

- Goal: Maximum leveraging of funding  
Objective: Prioritize willing buyers/willing sellers  
  
Objective: Prioritize critical lands to acquire
- Goal: Equitable and sustainable acquisition of property  
Objective: Creative funding sources  
  
Objective: Exchange of federal and private land transfers  
  
Objective: Bonding (backed by sales tax/specific to ski areas/ticket sales)
- Goal: Open Meetings Act must be adhered to  
Objective: Meetings Act should be amended  
  
Objective: State Department to monitor/ensure compliance  
  
Objective: Means of enforcement (fines) for non-compliance

3. The committee also came up with the following goals and objectives regarding private property conflicts:

- Goal: Fair and balanced approach to land acquisition  
Objective: Create criteria to be included in the legislative process
- Goal: Politics and money should not be put above public interest/private property rights  
Objective: Slow down NRCA process and get it right before implementation

## APPENDIX B: INDIVIDUAL MEETING REPORTS

# Executive Water Task Force, Private Property Task Committee

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14 June 2018 / Salt Lake City, UT

Resolving Public-Private Conflict Surrounding Salt Lake Valley Watersheds  
Report prepared by Utah Open Lands from meeting minutes

## REPORT

### SUMMARY

1. Utah watersheds and water quality are threatened by development and human/animal presence, which increase threats in the form of emerging contaminants and demand greater protection.
2. Improvements and protection could be implemented through conservation of privately owned land in the canyon.
3. Private property in the canyons causes complications and issues from clean title to mineral interest values, and need to be properly vetted in establishing fair and clear guidelines for equitable solutions.
4. Current watershed protections have decreased human health threats for purchasing additional watershed land.
5. A conservative methodology and criteria should be developed for determining land protection, and therefore, watershed protection, when addressing private property in the canyons.
6. Solutions will be limited without sufficient funding.
7. Funding can be leveraged through grants and tax incentives.

### CURRENT STATUS

Primary Salt Lake Valley water sources in the canyons (Big Cottonwood, Little Cottonwood, Parley's, City Creek and Emigration) are at risk of increased contamination and development. The proposition of additional water source protection is being discussed as part of the overall watershed status updated acknowledging private landowner rights.

### BACKGROUND

- About 60% of the drinking water in the Salt Lake Valley comes from the canyons. The protected nature of the canyons does not eliminate the need to extensively treat water through conventional treatment. There are nationwide examples of cities and areas where extensive treatment is nearly eliminated due to increased protection of watersheds. **For example, 70% of**

the water used by New York City is not conventionally treated, only disinfected. The costs for maintenance and failure of treatment plants could be mitigated significantly, because Salt Lake City has jurisdictional control over the water supply and watersheds. However, more could be done in terms of protection.

- **In 1986, a study was done stating, “Campers and dogs may have significantly contributed to the pollution of the Albion basin and the most likely source was continual leakage from the cabins.”** With increased development of cabins, there is always going to be a risk of cabin leakage, irresponsible use of land and amenities and natural degradation of the land and water source due to increased use, development and persistent disrespect for the regulations in place to protect drinking water.
- The EPA now considers the following to be the six greatest threats to water quality in the United States, *ALL* of which are due to increased human presence and development:
  1. Agriculture (including animal excrement, extended use of land and fertilizers)
  2. Fossil fuels (coal ash and emission pollution)
  3. Waste water (cabin leakage)
  4. Pharmaceuticals (birth control, antidepressants also causing mutations in local wildlife, from human excretion and irresponsible disposal)
  5. Development (causing erosion, increased sediment in water, presence of humans and animals)
  6. Climate change (changing patterns of climate change and runoff to which the environment cannot adapt, causing for example, higher volume of spring runoff thus increasing harmful bacteria in water).
- **Rosemary Bailess, a water rights Attorney, provides historical evidence for problematic overuse of watersheds. In the 1930s, “runoff flu” in residents was becoming prevalent due to bacteria and pathogens within the system. Additionally, in the early 1900s-1950, City Creek was overused which caused typhoid and other diseases to affect the population, resulting in severe illness and death.**
- As climate change shifts weather patterns and the Canyons experience greater precipitation, higher levels of contaminants will occur, demonstrating a need for greater care and protection of watersheds, rather than a reduction in regulation. Additionally, an increase in recreation will elevate levels of contaminants. There are over 1.7 million seasonal visitors for a 17-mile canyon. During spring runoff, there are no bathrooms and no drinking water available. This encourages inappropriate and hazardous use of the land, including human and animal excrement infiltrating water sources.
- Further downstream at the treatment facilities, there are additional issues emanating from a lower quality water source:
  - Lower quality water requires a more intense treatment process and plants have the potential to fail if you introduce enough vulnerability. For example, in 1993 in Milwaukee, a plant failed and over 400,000 people were exposed to cryptosporidium. There were numerous fatalities and well as hundreds of millions of dollars used to deal with emergency needs and the complete shut-down of the system, according to the CDE. This can be avoided by protecting water at the source and the risk of plant failure and of hazardous contaminants in the water could be mitigated.
- According of SLP, there is a correlation between development and the pollution of water supplies, including increased runoff and erosion and facilities not working properly.
- During the acquisition of property, there are certain regulations to qualify for a conservation easement and a commitment must be made to maintain conservation values.

- Visual inspection of the property.
- Evaluation of the potential threats to the property's conservation value and any current or potential risks associated with the project, the goal being to determine what things could potentially infringe on conservation.
- A qualified appraiser who is familiar with easements is contracted for this. It is important to keep in mind the ordinances and what the likelihood of development will be and how it will affect the property.
- Title investigation of easements to address access and subordination of encumbrances or mineral estate. Clear title is important.
- Assessment of the project's stewardship implications to ensure it is possible to be upheld by the landowner and conserving organization, on example being toxic materials present on the property.
- Legal review appropriate to the complexity of the project is essential. The trust will have its own legal counsel and strongly encourages the land owner to obtain independent legal counsel. Often time land will require a survey to be done, in case for example, mining claims have not been done, claims overlap and become very complicated.
- Recommendation that each party to the transaction obtain independent legal, financial and tax advice to ensure that each party is appropriately represented.
- Preliminary environmental investigation, transaction screen or Phase 1 assessment.
- Determination of both the legal description and physical boundaries of each property or conservation easement.

## ANALYSIS

- According to historical evidence and nationwide concerns for water quality, it would benefit the Salt Lake Valley and the state financially to increase protection of watershed, as opposed to maintaining treatment plants, risking failure, and failing to have a protected watershed, not to mention the effect on economic values closely associated with outdoor recreation and scenic beauty as reasons people visit, move to and locate business to Utah.
- Addressing public health issues nationwide, the well-being and health of the public could be at risk with a decrease of water source quality.
- According to the EPA, impacts to the environment are the biggest threat to water quality in the United States. Therefore, minimizing development and poor stewardship behavior could protect the quality of water sources. With increased recreation and human-generated contaminants, it is a necessary solution.
- Watersheds can be protected through numerous tools from conservation easements.
- In talking about prioritizing parcels of land for conservation, numerous organizations list the following to take immediate precedence: lands in need of restoration (Natural Resource Conservation Service), lands with high levels of habitat and lands with the highest potential for public benefit (Land Trust Alliance and New York State Department of Public Service, Ecological Service of America) *all* of which apply to the canyon watersheds in the Salt Lake Valley.
- If development continues in watershed areas, which are already experiencing many vulnerabilities, it is only going to get more difficult to maintain an acceptable water quality in the Salt Lake Valley.

# Executive Water Task Force, Private Property Task Committee

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12 July 2018 / Salt Lake City, UT

Resolving Public-Private Conflict Surrounding Salt Lake Valley Watersheds  
Report prepared by Utah Open Lands from meeting minutes

## REPORT

### SUMMARY

The committee responded through survey and asked for the following:

1. That a presentation with additional information will be needed about how to set up criteria for acquiring land in the canyon.
2. Recreational economics and impacts in the canyons be addressed. A presentation is being set up for the next meeting.
3. Criteria be developed for land acquisition by compiling numerous sources including different states throughout the country, different organizations and how they prioritize land acquisition.

Committee was lead through a facilitated discussion under three main areas where the committee sees conflict with private property rights: 1) how to ensure watershed protection, 2) how to effectively deal with recreational use in the canyons and 3) how to alleviate private property conflicts. The committee developed goals and objectives to deal with the three overarching areas of concern. The committee was then asked to vote on the goals and objectives providing their 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> order of priority.

### GOALS AND OBJECTIVES

The following are the goals and objectives developed by the committee through the facilitated discussion around the topic of Ensuring Watershed Protection.

1. The following goal was ranked by the committee as the most important (based on number of votes):

- Goal: Protect watershed through acquisition of inholdings
  - Objective: Identify funding sources
  - Objective: Create new funding sources
  - Objective: Acquisition protocol and methodology must be conservative and robust
  - Objective: Non-governmental and local organizations providing matches

2. The following were ranked by the committee to be of secondary importance in dealing with watershed protection:

- Goal: Create funding opportunities for acquisition statewide
  - Objective: Priority Cottonwood Canyons
  - Objective: Solve lack of funding overall

- Goal: Ensure adequate and sustainable partnership of stakeholders  
Objective: Regulatory and funding cohesiveness
- Goal: Prevent contamination  
Objective: Review old regulations and look to update based on best technology/best practices  
Objective: Water Ombudsman to create cohesiveness over multiple jurisdictions (examples CWC and Provo River Watershed Council)
- Goal: Eliminate further cabin leakage  
Objective: Acquire undeveloped, developable land, provide an incentive for compliance with standards

3. The committee also came up with the following goals and objectives regarding watershed protection:

- Goal: Providing Adequate Toilets  
Objective: Government provide funding  
Objective: Not disconnecting current toilets from sewer system
- Goal: Create funding  
Objective: Create water shares for current toilets  
Objective: Use NRCA process to address needs
- Goal: Keep water as clean as it is today  
Objective: Convert to sewer, prohibit septic  
Objective: Sanitary facilities for recreational users
- Goal: Mitigate water quality impacts from development
- Goal: Mitigate recreational impacts and visitors  
Objective: Fund inholdings

The following are the goals and objectives developed by the committee through the facilitated discussion around the topic of recreational use was broadened to Effectively Dealing with Visitors in the Canyons.

1. The following goal was ranked by the committee as the most important (based on number of votes):

- Goal: Develop adequate facilities for quality recreational experience  
Objective: Provide on-going funding to assist entity impacts  
Objective: Create interlocal cooperation  
Objective: Identify what facilities are needed versus what facilities exist/function (toilets, transportation, trails, potable water)  
Objective: NRCA should include funding for this infrastructure
- Goal: Provide on-going funding to assist entity impacts  
Objective: Pay to play/limit use/user pays to educate about impacts and create ownership  
Objective: Interlocal source related to visitors

2. The following were ranked by the committee to be of secondary importance in dealing with visitors in the canyons:

- Goal: Deal with associated needs due to visitation, like road width and parking

Objective: Limit use

Objective: limit vehicles with shuttle/bus/other various solutions

- Goal: Fire suppression 21

Objective: Funding for forest management

Objective: Ensure fire management strategies are incorporated to NCRA and urban wilderness

3. The committee also came up with the following goals and objectives regarding visitors in the canyons:

- Goal: Multijurisdictional entity to address multiple impacts

Objective: CWS and Provo River Watershed Council as examples

Objective: Find multiple examples to draw from

- Goal: Identify carrying capacity of watershed

Objective: limit visitation/toll/bus system/reservation system up to carrying capacity

Objective: local determination of impacts and how to address them

Finally, the committee developed goals proposed to alleviate private property conflicts.

1. The following goal was ranked by the committee as the most important (based on number of votes):

- Goal: Protect the public trust by not creating private benefit

Objective: Establish criteria which rewards landowner contributions

Objective: Establish validity and checks/balances in land acquisition

Objective: Deal with only willing buyers/willing sellers

- Goal: Assuring long-term protection of acquired lands

Objective: funding for stewardship

2. The following were ranked by the committee to be of secondary importance in dealing with private property conflicts:

- Goal: Maximum leveraging of funding

Objective: Prioritize willing buyers/willing sellers

Objective: Prioritize critical lands to acquire

- Goal: Equitable and sustainable acquisition of property

Objective: Creative funding sources

Objective: Exchange of federal and private land transfers

Objective: Bonding (backed by sales tax/specific to ski areas/ticket sales)

- Goal: Open Meetings Act must be adhered to

Objective: Meetings Act should be amended

Objective: State Department to monitor/ensure compliance

Objective: Means of enforcement (fines) for non-compliance

3. The committee also came up with the following goals and objectives regarding private property conflicts:

- Goal: Fair and balanced approach to land acquisition  
Objective: Create criteria to be included in the legislative process
- Goal: Politics and money should not be put above public interest/private property rights  
Objective: Slow down NRCA process and get it right before implementation

## ANALYSIS

- According to the goals developed by the committee, funding acquisition needs to be addressed. In land acquisition and facility maintenance, funding is necessary and will need to be addressed.
- Protection of watershed lands is essential in maximizing public benefit.
- Public-private cooperation, as well as cooperation with other entities, is essential in land acquisition and in gaining funding.



# Executive Water Task Force, Private Property Task Committee

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23 August 2018 / Salt Lake City, UT

Resolving Public-Private Conflict Surrounding Salt Lake Valley Watersheds  
Report prepared by Utah Open Lands from meeting minutes

## REPORT

### SUMMARY

The committee discussed recreational impact and experience in Utah and the canyons. Potential funding sources through a 50/50 matching grant were discussed. Additionally, the committee reviewed goals determined during the July meeting and discussed how to develop adequate facilities to balance recreational experience and watershed impacts in the canyons.

### RECAP: WHERE ARE WE NOW?

To summarize what has been discussed and decided upon in the previous meetings:

In our first meeting, held June 14, 2018 the committee discussed and concluded the following:

- Utah watersheds and water quality are threatened by development and human/animal presence, which increase threats in the form of emerging contaminants and demand greater protection.
- Improvements and protection could be implemented through conservation of privately owned land in the canyon.
- Private property in the canyons causes complications from clean title to mineral interest values, and need to be properly vetted in establishing fair and clear guidelines for equitable solutions.
- Recreational impacts in the canyons must be addressed in order to alleviate conflict.
- A conservative methodology and criteria should be developed for determining land protection, and therefore, watershed protection, when addressing private property in the canyons.
- Solutions will be limited without sufficient funding, which can be leveraged through grants and tax incentives.
- According to historical evidence and nationwide concerns for water quality, it would benefit the Salt Lake Valley and the state financially to increase protection of watershed (as opposed to maintaining treatment plants, risking failure, and failing to have a protected watershed) not to mention the effect on economic values closely associated with outdoor recreation and scenic beauty as reasons people visit, move to and locate business to Utah.
- According to the EPA, impacts to the environment are the biggest threat to water quality in the United States. Therefore, minimizing development and poor stewardship behavior could protect the quality of water sources, especially with an increase in recreation and human-generated contaminants.
- In talking about prioritizing parcels of land for conservation, numerous organizations list the following to take immediate precedence: lands in need of restoration (Natural Resource Conservation Service), lands with high levels of habitat and lands with the highest potential

- for public benefit (Land Trust Alliance and New York State Department of Public Service, Ecological Service of America) *all* of which apply to the canyon watersheds in the Salt Lake Valley.
- If development and irresponsible recreational use continues in watershed areas, which are already experiencing many vulnerabilities, it is only going to get more difficult to maintain an acceptable water quality in the Salt Lake Valley.

During the second meeting, held July 14, 2018, following goals and objectives were formulated and ranked by committee members' votes. While the committee is generated around private property conflict, how we ensure watershed protection and how we deal with recreational use in the canyons are integral in solving private property conflict.

#### Goals developed on the topic of **Ensuring Watershed Protection:**

The following goal was ranked by the committee as the most important (based on number of votes):

- Goal: Protect watershed through acquisition of inholdings  
Objective: funding sources  
Objective: Create new funding sources  
Objective: Acquisition protocol and methodology  
Objective: Non-governmental organizations providing matches

The following were ranked by the committee to be of secondary importance in dealing with watershed protection:

- Goal: Create funding opportunities for acquisition statewide  
Objective: Prioritize the Cottonwood Canyons for funding acquisition  
Objective: Solve lack of funding overall
- Goal: Ensure adequate and sustainable partnership of stakeholders  
Objective: Regulatory and funding cohesiveness
- Goal: Prevent contamination  
Objective: Review old regulations and look to update based on best technology/best practices  
Objective: Water Ombudsman to create cohesiveness over multiple jurisdictions
- Goal: Eliminate further cabin leakage  
Objective: Acquire undeveloped, developable land

#### Goals developed on the topic of recreational use, which was broadened to **Effectively Dealing with Visitors in the Canyons:**

The following goals were ranked by the committee as the most important (based on number of votes):

- Goal: Develop adequate facilities for quality recreational experience  
Objective: Secure funding  
Objective: Create interlocal cooperation  
Objective: Identify what facilities are needed (toilets, transportation, trails, potable water)  
Objective: Delaying NCRA until these facilities are provided
- Goal: Provide on-going funding to assist entity impacts  
Objective: Pay to play/limit use/user pays to educate about impacts and create ownership  
Objective: Interlocal source of funding related to visitors and recreation

## Goals developed on the topic of **Alleviating Private Property Conflict:**

The following goals were ranked by the committee as the most important (based on number of votes):

- Goal: Protect the public trust by not creating private benefit  
Objective: Establish criteria which rewards landowner contributions  
Objective: Establish validity and checks/balances in land acquisition
- Goal: Assure long-term protection of acquired lands  
Objective: Acquire funding for stewardship

The following were ranked by the committee to be of secondary importance in dealing with private property conflicts:

- Goal: Maximum leveraging of funding  
Objective: Prioritize willing buyers/willing sellers  
Objective: Prioritize critical lands to acquire
- Goal: Equitable and sustainable acquisition of property  
Objective: Creative funding sources  
Objective: Exchange of federal and private land transfers  
Objective: Bonding (backed by sales tax/specific to ski areas/ticket sales)
- Goal: Open Meetings Act must be adhered to 222  
Objective: Meetings Act should be amended  
Objective: State Department to monitor/ensure compliance  
Objective: Means of enforcement (fines) for non-compliance

According to the goals developed by the committee, funding acquisition is of the utmost importance and is integral in alleviating conflict in the canyons. In land acquisition and facility maintenance, funding is necessary and will need to be addressed.

Protection of watershed lands is essential in maximizing public benefit.

Public-private cooperation, as well as cooperation with other entities, is essential in land acquisition, gaining funding and maintaining balance between recreational experience and watershed impacts.

## **MEETING OVERVIEW**

In the August meeting, the committee primarily discussed recreational impacts and experience in the canyons. Tom Adams presented on the impacts and importance of recreation in Utah. In the United States, the outdoor economy generates \$887 billion dollars in consumer spending annually, and in Utah alone, recreation is a \$12.3 billion industry, providing over 110,000 jobs. It has transitioned several economies in Utah cities, including Ogden, Moab and park City, making recreation a major driver of the economy. Employers are using recreation in Utah to recruit employees, bring thousands of employees to the state. The interest is growing but as a state, Utah is reaching capacity and maintenance is becoming a burden.

**UORG:** The Governor's Office has a budget of \$1 million annually over the course of 5 years dedicated to the Utah Outdoor Recreation Grant (UORG), providing a matching grant to assist in managing and enhancing recreational experiences in Utah.

In addition, the committee discussed goals developed in the previous committee. The goal developed preciously was to "Develop adequate facilities for a quality recreation experience." After discussion, the

goal was revised to “Develop adequate facilities to balance recreational experience and watershed impacts. To accomplish this, four objectives were identified: obtain funding, create interlocal cooperation, identify facilities needed, and to delay the NCRA. The committee discussed each of these objectives and determined the following under each objective:

#### Funding

- A broad swath of funding partners needs to be identified
- Leverage funding (and find partners who can)
- Enhance the grand program that Tom discussed to include maintenance (and partner with local organizations to accomplish this)
- Federal funding needs to be a greater component
- NRCA/ Federal funding should be pushed to include an appropriation request
- Compile different funding sources
- Youth Stewardship legislation
- Determine private/community/local/state funding sources
- Consideration of user fees (toll, parking fee, ski ticket surcharge, etc.)

#### Create Interlocal Cooperation

- A leader must be established who drives decision making of a coalition
- Leader should be considered more of a facilitator
- There should be better coordination among entities and determine best practices
- County Recreation district to get funding and management
- Look at the CWC as facilitator for interlocal agreement for the canyons
- Consider data center or dashboard

#### Identify Facilities Needed

- Collate existing studies on recreational facilities that have been done and are effective, and prioritize elements for our best benefit
- Examine State Parks
- Consider management of facilities and maintenance under federal nexus
- Determine the carrying capacity of the canyons

#### Delay NCRA

- Consider moving NRCA forward [only if/including] proposition for a funding component from federal government
- Components of NCRA or existing plans in place should be updated or implemented if useful in watershed protection

### MEETINGS ANALYSIS

In looking at the discussions from previous meetings, there are three main categories that need to be addressed within the subcommittee: watershed protection, recreation, and funding. Each of these issues contributes to the over-arching concern regarding private property conflict in the canyons. With an increase of visitors up the canyons, conflicts are increasing. Water quality and recreational experience are at stake if current patterns continue. In discussion of determined necessary funds, potential funding sources, and allocation of funds, solutions regarding private property conflicts are a viable prospect.

### NEXT MEETING

The committee determined that members are to investigate potential funding sources for recreation in the canyons by the next meeting. In addition, the committee will discuss in depth about another goal: Protecting the public trust by not creating public benefit. This goal contains the following objectives:

- Establish criteria which rewards landowner contribution
- Establish validity and checks and balances in land acquisition
- Assure long term protection of acquired lands
- Fund stewardship

**Report of the Department of Natural Resources Water Supply / Surplus Water Committee  
September 28, 2018**

This committee was appointed by Department of Natural Resources Executive Director Mike Styler pursuant to legislation enacted during the 2018 General Session that the Department study several water issues and report to the legislature. Specifically this committee was tasked with examining the way governmental entities which are Public Water Suppliers secure water supplies and make that water available to their customers. The committee appointed to study the issues consisted of Representative Kim Coleman, Tom Ward – Sandy City, Mark Stratford – Ogden City, Paulina Flint – White City, Dave Decker – Provo City, Richard Bay – Jordan Valley Water Conservancy District, Cameron Diehl – League of Cities and Towns, Ed Bowler – Washington County Water Conservancy District, and Boyd Clayton - Utah Division of Water Rights. The committee met seven times beginning May 29, 2018. Committee members and the public were invited to attend and participate in each meeting. There were 20 people or more in attendance at each meeting and all committee members attended most meetings, participated by phone, or designated a representative who participated. Materials for each meeting and a recording of the meeting are available at [waterrights.utah.gov](http://waterrights.utah.gov) by selecting “meetings”, “study committee meetings.”

The committee identified several issues which became the focus of the meetings which followed. Those issues are:

- 1) Why do entities serve outside their political jurisdiction?
- 2) How pervasive is service outside of political jurisdiction?
- 3) What rights do customers outside of a jurisdiction have and should they have?
- 4) What happens when a private entity serving water is occurred by a governmental entity?
- 5) How can transparency be improved so the public can better understand their water service?
- 6) What are the implications of a customer with a master meter?
- 7) Should governmental entities have more water than needed to supply their customers and do they have a duty to supply water to land owners in an area where they have essentially a monopoly on water rights?

**Origins of the Surplus Water Category**

Our committee explored the legal underpinnings of two types of governmental entities: Water Districts and Municipalities (Cities and Towns). Both are authorized by statute or the constitution to provide water service inside their political jurisdiction. We quickly discovered both also provide water service outside their political jurisdiction. Water District statutes have permissive language allowing such activity. Municipalities have a more narrow permissive provision in statute which allows them to provide water services outside their political jurisdiction but they may do so only with surplus capacity.

Cities operate under a Utah Constitution restriction stated in Article XI, Section 6. The provision prohibits alienating their water works and water rights but allows trades of equal value. They are charged in the constitution to utilize water rights and waterworks to provide water to their inhabitants at reasonable charges. Local Districts are not included in Article XI and are authorized in statute to buy and sell waterworks and water rights.

Utah's constitutional prohibition against alienation of water rights and works by municipalities is unique in the western states. There is no known record which describes why the framers of Utah's constitution thought the issue of preserving water rights and water works in the name of the municipality was so important but a Utah supreme court case decided in 1904 may give a glimpse into issues which likely contributed to crafting the provision. Ogden City in the late 1800s was struggling to maintain and expand its water system to meet growing needs. In its pursuit of solutions the city accepted the proposal of a private party in 1889 who promised to construct a water system for the city and recover the cost by leasing the city's water rights, which he used to serve city demands as well as sell water to others. Under the contract city water users paid rates for the service to the private party. The agreement also allowed the city to gradually purchase the system. Although the bargain appeared to successfully meet city needs, a subsequent city council objected to the arrangement and sought to recover the water system and rights through litigation. That was all going on about the time the Utah constitution was being written.

The committee discussed whether the constitutional provision is necessary given the fact other states are operating without it. We heard concerns about privatized systems that have developed in some cities outside the state and conflicts which have developed as a result. It was acknowledged that private systems serving the public were not prohibited in Utah and we have some towns that are served that way but there is a greater tendency when those systems experience crisis to dedicate them to the town. Once the works move into ownership of a municipality the constitutional prohibition against alienation limits further privatization. The legislature has entertained alteration and elimination of the constitutional provision in the past but primarily because of opposition by the League of Cities and Towns such legislation has not been successful. Representatives of the League attending our committee meetings expressed the view that continuing the prohibition would be wise to avoid the possibility a city legislative body in a moment of weakness given their multifaceted responsibilities might consider selling their water rights or works to the long term detriment of the community. It was expressed that Districts do not face the same pressures since serving water is their primary business while it is just one of the many things a city does.

Utah statute 10-8-14 provides that cities may sell and deliver surplus product or service capacity including water outside their political jurisdiction. The committee concluded these differing provisions make it possible for both cities and districts to legally provide water service outside their boundaries but with different constraints. The lack of an alienation prohibition also allows local districts to function with greater flexibility both in acquiring water rights and waterworks and marketing those not needed strategically.

### **Reasons for Service Outside Political Boundaries**

In a perfect world a governmental entity's reach extends no further than its statutorily defined boundary. On inquiry we found that most districts and municipalities provide water service outside their boundaries. Although some people have forwarded theories of nefarious or monopolistic motives we found convenience, enhancement of community or economic opportunities, community partnerships, easement acquisition considerations, and planned future annexation to be among the reasons for serving water outside a political jurisdiction.

We found through a survey conducted by the League of Cities and Towns that a majority of municipalities that responded to the survey serve water outside their jurisdiction. As we pressed to obtain more quantitative measures of water provided outside political jurisdictions we experienced resistance from the water providers who wanted to know more about how the information would be

used before agreeing to provide it. We recognized this as a transparency roadblock to be overcome if there are legitimate questions additional reporting could answer without delving into what those questions might be. Concern was expressed that there is not consistency in how planning occurs for populations served outside of the political jurisdiction and assuring those customers are consistently part of reported water use and planning.

### **Quality of Service**

While municipalities are prohibited from alienating their water works and it is therefore doubtful if challenged, they could continue serving outside their jurisdiction to the detriment of their inhabitants, some cities treat customers outside their jurisdiction exactly like those inside their jurisdiction. Some use a different rate structure recognizing their inhabitants pay for city services included in water service through other fees and taxes and some make it clear the service is temporary in nature and could end should the water be needed for inhabitants inside the jurisdiction. In at least one instance the city provides culinary service outside its jurisdiction which they say they treat like permanent water customers and also contracts with others for the use of surplus water outside their jurisdiction which they clearly advertise is a terminable proposition. Other cities do not necessarily do surplus water by contract but make clear in ordinance that connections outside their political jurisdiction are on a surplus basis and are terminable. We also found that wise water agencies were cooperating with neighboring communities to provide redundancy through water contracts so that in the event one entity experiences a problem they could rely on the water supply of their neighbor entity. These are often called surplus water agreements.

We also found the quality of water service outside and inside a political jurisdiction may vary depending on how the entity regards the nature of the service. Some view all connections as part of their water system and feel responsible under Division of Drinking Water Regulations to generally provide the same level of service throughout their system. Others may not have public infrastructure like fire flow capacity and fire hydrants planned as part of the service or there may be differences in the quality and extent of facilities maintenance. Some simply allow a connection to waterworks which have been installed to deliver water to the municipality requiring all development and maintenance beyond the connection to be the responsibility of the water user. Given the variety of approaches, it is not surprising those receiving water service outside a political jurisdiction are confused and may feel disenfranchised as they compare their situation to that of others who appear to be similarly situated.

### **PSC Supervision**

The rights of customers outside a jurisdictional boundary became a point of specific focus. Fred Finlinson shared conclusions from a study he led in the 1990s looking into this issue. At the time there was significant discontent over the pricing structure and quality of service issues. Water users outside the political jurisdiction felt disenfranchised because they had no effective voice in the governance of the entity which provided their water service. In one instance a private water company which was regulated by the Public Service Commission (PSC) was acquired by a city and the question arose whether continued PSC oversight could be expected even though cities are statutorily exempted from PSC oversight and the legislature appears to be constitutionally constrained from delegating supervision of local government functions to special commissions. In response to the specific situation before the PSC, that body later ruled their jurisdiction once invoked continued until the PSC concluded their intervention was no longer necessary and was not a function of changes in ownership of the entity.

Our committee heard from former PSC commissioner Stephen F. Mecham regarding regulation of water utilities. He indicated that regulation of such utilities is difficult because there are so few of them and their resources are so limited finding reasonable standards from which to judge operations is



problematic. He expressed the opinion that water users would be better served if they could devise their own solutions without the commission's intervention.

### **Water Rates**

The topic of water rates and rate setting was a significant point of discussion. The committee reviewed the case of *Platt v. Town of Torrey* which was a case specifically about the Town's inconsistent rate setting to customers outside its jurisdictional boundary. The Utah Supreme Court ruled the Town was not required to use the same rate for customers inside the town's boundary as those outside but that rates for outside customers should have some reasonable basis and be consistent among similarly situated customers. Importantly, the court noted that PSC jurisdiction does not apply to cities. The court offered the distinction that rates for a town's inhabitants could be challenged on the basis of administrative process and the ultimate remedy was the ability to replace the legislative body which set the rate. In the case of customers outside the city's jurisdiction the court noted there likely is no recourse except judicial review for reasonableness.

### **Water Hoarding vs Redundancy**

Our committee heard from water customers frustrated that their only option appeared to be to purchase surplus water from a municipality which has purchased all of the water rights in the area. The view was expressed that since they are the ones beneficially using the City's water it belonged to them. Alternately the view was expressed that cities are acquiring much more water than they need as evidenced by the surplus water sales. Cities expressed the view that their responsibility was to plan for future contingencies. The water rights they hold do not necessarily consistently yield the amount of water the rights on paper indicate is potentially possible. They pointed out that in our time a city should not be relying on just one water source. Contamination or failure of works could easily render a particular source unusable for a period of time. Water sharing agreements and connections to neighboring systems are an important component of redundancy and emergency planning but having redundant sources of their own becomes an important component of water planning as cities grow in size. The committee noted that although some surplus water contract recipients have expressed the view their only alternative is to purchase water from a municipality the reality is it is the least cost alternative and other means to supply the water are conceivable. From that standpoint cities do not operate as a monopoly outside their political jurisdiction because they have no authority to force people to use their water, they are just the most attractive alternative to secure water service. The committee also expressed doubt about the view that a water user was entitled to the use of water just because they have historically been the one beneficially using it. Utah water law does not promote the shift of ownership only on the basis of use. There are many examples where a water right owner leases water to others but the lessee acquires no ownership interest in the water. That practice is within the existing law. Reflecting ownership of water rights in the name of those using the water would work chaos within the state since by their nature public water suppliers provide water to others. Further, the committee recognized a city under takings laws is treated like an individual and both the United States and Utah constitutions bar taking of property without just compensation making it unreasonable to assume a water user should simply through their use of contracted water acquire a right to use it.

### **Observations on Current State of Affairs**

The committee reviewed and generally concurred in the following observations regarding municipal water service:

- 1) The Utah Constitution prohibits municipalities from alienating their water rights, water supply, or water works. Alienation is defined in the constitutional provision as selling, leasing or,

disposing either directly or indirectly those resources. Exchanges of equal value are not prohibited. Municipalities are charged under the constitution to use their water resources to serve the municipality's inhabitants with water at reasonable charges (Article XI Section 6).

- 2) Cities are authorized by statute to sell surplus product or capacity "to others beyond the limits of the municipality" (10-8-14(2)(d)).
- 3) Local districts have no constitutional prohibition on alienating water and facilities but districts can only be created for a limited number of purposes (one of which is water services) and are generally limited by statute to provide services "within its boundaries" (17B-1-202). Like municipalities local districts are authorized in Section 17B-1-906 to sell surplus product or capacity services to others beyond the local district boundary.
- 4) Water Conservancy Districts have broad authority to contract with others for joint operations, sales, lease ... (17B-2A-1004(2)).
- 5) Providing water service outside the boundary of a municipality is a fairly common practice among Utah cities. The extent to which districts are providing services outside their boundary is less well known but is known to be occurring.
- 6) Although a city is generally protected against legislatively created oversight groups (Constitution Article VI, Section 28), the PSC has ruled that if the city purchases a utility providing service outside the city which was subject to PSC oversight the jurisdiction continues until the PSC decides it is no longer necessary.
- 7) The Utah Supreme Court in *Platt v. Town of Torrey* found that charges for service outside a municipality must be based on some rational basis (not arbitrary). This does not mean the charges must be limited to the minimum required to provide the service or based on the actual cost to provide the service, just that the rate be reasonable meaning there must be some rational basis.
- 8) Cities may be giving different water customers outside their boundaries different expectations about the service to anticipate and that view may change with time. Since all such service necessarily relies on a finding by the municipality that they have surplus to make available, any time based assurances provided by a city in contract or otherwise to customers outside their boundary are likely ultra vires. The only way they can assure customers outside their boundary that service will continue is to operate in a way that the surplus capacity persists and the elected leaders of the municipality remain supportive of making it available outside their boundary. No Utah court has addressed what limits may apply to either the termination or continuation of service outside of a city's political boundaries.

- 9) While municipalities may choose to make their rate setting process for those outside their boundary appear transparent and include input from those paying the rates they are under no statutory or constitutional obligation to do so. If those customers don't like the service they are receiving their choice is to seek it elsewhere or seek a court review of the rate as "reasonable". In *Platt v. Town of Torrey* the court articulates that they are the arbitrator of reasonable rates both for city residents (who also have a right to municipal government intervention) and those outside the city who have no other forum. Cities don't have water franchise authority outside their boundary and customers outside their boundary have essentially excluded themselves from representation in the municipality's function by failing to annex.
- 10) Water Service outside a city's boundary complicates state water planning since numbers reported may or may not include surplus water sales. Potentially affected values are: population, connections, wholesale deliveries. This issue is further complicated when developments employ master meters to circumvent drinking water rules within a development.
- 11) Issues associated with retail delivery of water to a particular area are not necessarily the same as circumstances where a city has a wholesale contract or a contract for water use in an area that is not part of the city's retail delivery system.

### **Moving Forward**

The committee reviewed revisions to Constitution Article XI proposed by the Constitution Revision Committee and voted unanimously in support of the proposed revisions as a starting point to address shortcomings in current Municipal practice of serving water outside their political jurisdiction. The committee developed and voted unanimously in support of proposed legislation as a companion bill to the constitution revision. The goal of the legislation is improved communication about the nature of the service provided, transparency, and service level assurances to those a municipality decides to include in its designated water service area. Two, provisions highlighted in yellow were proposed after the committee voted to support the legislation and were added at the request of the Division of Drinking Water to help the division identify and regulate unknown public water supplies. An email poll of committee members indicating their support of these added provisions has been requested but results are not complete as of the date of this report.

## Appendix

### Committee Proposed Legislation

## SECTION 1:

### 10-8-14 Utility and telecommunications services -- Service beyond municipal limits -- Retainage -- Notice of service and agreement.

(1) As used in this section, "public telecommunications service facilities" means the same as that term is defined in Section 10-18-102.

(2) A municipality may:

- (a) construct, maintain, and operate waterworks, sewer collection, sewer treatment systems, gas works, electric light works, telecommunications lines, cable television lines, public transportation systems, or public telecommunications service facilities;
- (b) authorize the construction, maintenance and operation of the works or systems listed in Subsection (2)(a) by others;
- (c) purchase or lease the works or systems listed in Subsection (2)(a) from any person or corporation; and
- (d) sell and deliver the surplus product or service capacity of any works or system listed in Subsection (2)(a), not required by the municipality or the municipality's inhabitants, to others beyond the limits of the municipality, except the sale and delivery of:
  - (i) retail electricity beyond the municipal boundary is governed by Subsections (3) through (8); ~~and~~
  - (ii) cable television services or public telecommunications services is governed by Subsection (12); and
  - (iii) water is governed by Section 10-7-14 and Section 10-8-22.

.... (section continues beyond this point, but no changes proposed to the rest of 10-8-14).

## SECTION 2:

### 10-7-14. Rules and regulations for use of water – Adoption of designated water service area.

(1) For purposes of this section:

- (a) "Retail customer" means an end user who receives culinary water directly from a municipality's waterworks system and is billed by the municipality for water service.
- (b) "Waterworks system" means municipally owned collection, treatment, storage and distribution facilities for culinary or irrigation water, including pipes, hydrants and appurtenances, but does not include water rights or sources of water supply such as wells, springs, streams or shares in a mutual irrigation company.

(2) A municipality ~~[Every city and town]~~ may enact ordinances, rules and regulations for the management and conduct of the waterworks system owned or controlled by it.

(3) A municipality that provides water service to retail customers outside of its political boundaries shall:

- (a) create and maintain a map or maps showing its designated water service area and any other areas outside of its political boundaries where retail customers receive water service from the municipality and shall:
  - (i) transmit a copy of the map or maps to the state engineer; and
  - (ii) post the map or maps on its website if it has more than 500 retail customers;
- (b) define, by ordinance, those areas included in its designated water service area;
- (c) adopt by ordinance the municipality's rules and regulations applicable to its designated water service area and to retail customers located outside of its designated water service area; and
- (d) adopt, by ordinance, reasonable water rates for retail customers in its designated water service area as provided in Section 10-8-22.

- (4) Within its designated water service area, a municipality shall:
- (a) provide service to all retail customers in a manner consistent with principles of equal protection; and
  - (b) apply restrictions on water use to all retail customers in times of anticipated or actual water shortages in a manner consistent with principles of equal protection.
- (5) Nothing in this section:
- (a) precludes a municipality from enacting service or other restrictions affecting localized areas or the entire area of its designated water service area based on operational or maintenance needs, emergency situations, or to address health, safety and general welfare needs;
  - (b) expands or diminishes the ability of a municipality to enter into a contract to supply water outside of the municipality's designated water service area; or
  - (c) alters the authorities or definitions set forth in Title 19, Chapter 4, Safe Drinking Water Act.
- (6) A municipality may not sell or convey an interest in part or all of its waterworks system except to a public entity as defined in Section 73-1-4(1).

### **SECTION 3:**

#### **10-8-22 Water rates.**

- (1) For purposes of this section:
- (a) "Large municipal drinking water system" means a municipally owned and operated drinking water system serving a population of 10,000 or more.
  - (b) "Retail customer" has the same meaning as provided in Section 10-7-14.
- (2) A municipality shall [They may] fix the rates to be paid for the use of water furnished by the [city] municipality.
- (3) The setting of municipal water rates is a legislative act.
- (4) Within its designated water service area, a municipality shall:
- (a) establish, by ordinance, reasonable rates for the services provided to its retail customers;
  - (b) use the same method of providing notice to all retail customers of proposed rate changes; and
  - (c) allow all retail customers the same opportunity to appear and participate in public meetings addressing water rates.
- (5) A municipality may establish different rates for different classes of retail customers within its designated water service area if such treatment has a reasonable basis.
- (a) A reasonable basis for charging different rates may include, among other things:
    - (i) Differences in the cost of providing service to a particular class;
    - (ii) Whether one class bears more risk in relation to system operations or obligations;
    - (iii) Investments made by one class to acquire water sources and supply or build or maintain the system that are different from another class;
    - (iv) Needs or conditions of one class that are distinguishable from the needs or conditions of another class and, based on economic, public policy or other identifiable elements, support a different rate; and
    - (v) A differential based on other cost of service standards or industry accepted rate setting methods.
  - (b) A reasonable basis for charging a different rate does not include an adjustment based solely on the fact that a particular class is located either inside or outside of the municipality's corporate boundary without further justification.

- (6) If more than ten percent of the retail customers within a large municipal drinking water system's designated water service area are located outside of the municipality's corporate boundary, the municipality shall:
- (a) post on its website the rates assessed to retail customers within the designated water service area;
  - (b) establish an advisory board to make recommendations to the municipal legislative body for water rates, capital projects and other water service standards;
  - (c) include on the advisory board representatives of retail customers within the designated water service area whose connections are located outside of the municipal boundary as follows:
    - (i) If more than ten percent but less than thirty percent of the retail customers are outside of the municipal boundary, then a minimum of twenty percent of the advisory board members shall represent such customers; or
    - (ii) If thirty percent or more of the retail customers are outside of the municipal boundary, then a minimum of forty percent of the advisory board members shall represent such customers; and
  - (d) solicit recommendations for the representatives described in subsection (6)(c) from any municipality and county whose residents are retail customers within the designated water service area.
- (7) A municipality that supplies water outside of its designated water service area shall do so only by contract and shall include in the contract the terms and conditions under which the contract may be terminated.
- (8) A municipality shall notify the Director of the Division of Drinking Water of the contracts it has entered into outside of its designated water service area, including the name and contact information of the person or entity named in each contract, and shall provide an annual supplement with new or additional information.

#### **Section 4: New Section**

73-5-16: The state engineer shall publish conspicuously on the state engineer's website the map or maps submitted by a municipality pursuant to Section 10-7-14(3)(a).

#### **Section 5. Delayed Effective Date**

This bill takes effect on January 1, 2021, if the amendment to the Utah Constitution proposed by \*\*\*\*\*, 2019 General Session, passes the Legislature and is approved by a majority of those voting on it at the next regular general election.



**Article XI, Section 6 [Municipalities ~~forbidden authorization to supply water for public water supply purposes to its designated service area.~~sell waterworks or rights.]**

(1) No municipal corporation, shall directly or indirectly, lease, sell alien or dispose of ~~any waterworks~~, water rights, or sources of water supply now, or hereafter to be owned or controlled by it for the public supply of water; but all such ~~waterworks~~, water rights and sources of water supply now owned or hereafter to be acquired by any municipal corporation, shall be preserved, and maintained and operated by it for supplying its designated water service area ~~inhabitants~~ with water at reasonable charges. ~~:- Provided, That~~

~~-(2) Each municipal corporation may define by ordinance the limits of its designated water service area and terms of service.~~

~~-(3) Nothing herein contained shall be construed to prevent any such municipal corporation from:~~

~~-(a) Contractually committing water currently in excess of the needs of its designated water service area for use outside its designated water service area;~~

~~-(b) Supplying the commodity of water to retail consumers within its designated water service area at reasonable rates as established by ordinance; or~~

~~-(c) exchanging water-rights, or sources of water supply, for other water-rights or sources of water supply of equal value in meeting a municipality's needs, and to be devoted in like manner to the public supply of its designated service area ~~inhabitants~~.~~