**Memorandum**

**To: Boyd Clayton**

**From: Fred W. Finlinson**

**Subject: Conceptual Draft to implement the Changes to the Constitution/Surplus Contracts**

**Date: July 11, 2018**

Following the discussions of the combined Working Groups on both the Constitution and Surplus Contracts, I’ve attempt to create a conceptual frame work for changes to UCA 10-8-14 to reflect the concepts discussed. This draft is designed to look at concepts that can be refined and included in legislation that will not take affect until there is an approved change to Utah Constitution Article XI, Section 6. The existing law authorizing surplus contracts is UCA 10-8-14.

Currently, a municipality may provide water, sewer, gas works (“natural gas”), electric light works (“electricity”), telecommunications, cable television, public transportation or public telecommunications services to customers beyond the limits of the municipality. UCA 10-8-14(2)(d). The provision of electrical services is restricted by Subsections (3) - (11). Public telecommunications services or cable television services are subject to Subsection (12). The UCA 10-8-14(2)(d) services are subject to a surplus provision, “sell and deliver the surplus product or service capacity … not required by the municipality or the municipality’s inhabitants.”

The current proposal prepared by the Constitutional Working Group for change to Article XI, Section 6 while maintaining a restriction or alienation of water rights or sources of water supply, the constitution is proposed to be amended to allow municipalities to supply water “to its designated water service area with water at reasonable charges.” The designated water service area may include customers beyond the existing boundaries of the municipalities. The designated water service area is to be determined by the municipal ordinance.

To provide guidance for providing water service to designated water service area, the following concepts need to be amended into UCA 10-8-14.

1. Section 2 needs to be modified to transition from surplus sales to service to designated water service area. The existing Section 2 language can be amended to delete references to surplus sales and authorized water service to area outside the local boundaries in the following way:

Delete [surplus] and [not required by the municipality or the municipalities inhabitants]. Add a new (d)(iii) the supplying of water to designated service area beyond municipal boundaries is subject to Subjection (14).

The new (2)(d) would then read: Sell and deliver product or service capacity of any works or system listed in Subsection (2)(a) to others beyond the limits of the municipality, except the sale and deliver of: (i) (existing provision for electrical services), (ii) (existing provision for cable televisions or telecommunications services), and a new (iii) the supply of water to designated service areas is subject to the provision of Subsection (14).

2. New Section (14).

(14)(a) Except as provided in Subsection (14), a municipality may not sell or supply water to a designated service area to a retail customer located beyond its municipal boundary.

(b) Existing service to retail customers located beyond municipal boundaries is deemed to be in compliance with the provisions of subsection (14). (Grandfather clause)

(c) Nothing in this section expands or diminishes the ability of a municipality to enter into a wholesale water supply agreement with another municipality or public water supplier that supplies water to retail customers.

(d) Water supplied to a designated service area beyond municipal boundaries is deemed to be a beneficial use protecting the water from forfeiture providing the designated service area is:

(i) Established by ordinance. The ordinance process used to create designated service area must contain a provision allowing potential retail customers in the designated service area the opportunity to participate in the public process creating the ordinance for establishing the designated service. Once the service area is established, retail customers in the service area may obtained water service by entering to a Water Service contract with the municipality.

(ii) The designated service area ordinance contains a provision that the municipality will supply water service to the area on a perpetual basis as it does for residential customers.

(iii) The rate for the water service may be established pursuant to the municipality’s rate setting process for their residents. Potential customers living in the designated service area may participate in the public process in the same manner as municipal residents when the ordinances establishing both the service area and the water rates are considered by the municipality.

(iv) The rate for water service shall be reasonable but may differentiate from the water rate applicable to municipal residents, but the difference shall be reasonable as defined by the Platt v. Torrey City case.

(v) Non-municipal customers in the designated service area may refer the question of the whether the differential rate is reasonable to the Office of Property Rights for an advisory opinion as to whether the differential rate is reasonable. (Need to refer to the code provisions for the Office of Property Rights and the Property Rights code will have to be amended to include authorization for advisory opinions on water rates supplied to the designated service area.)

(vi) Failure to provide water to designated service areas as provided in Subsection (14) removes beneficial use protection to the water withdrawn from the water supplied to the designated water service.

3. Property Rights Office.

An amendment to the Property Rights Office is needed to provide authorization to participate in reasonableness of rate differentials. The Canal bill (2018 SB 96) added their issue to the jurisdiction of Office of the Property Rights. It could be used as an example for this provision.

4. Effective date of this Legislation is subject to the Passage of the Constitutional amendment.

5. Similar legislation could be drafted and added to the general section of UCA 17B for local districts. This pattern was used to the keep the Land Use legislation similar for both cities and counties.