

Limits on Water Diversion

1 **Amendment __ proposes amending the Colorado Constitution to:**

- 2 ♦ grant public ownership of all waters in the state;
- 3 ♦ allow water rights to be limited or curtailed when necessary to protect
4 the natural environment or to prevent irreparable harm to the public's
5 interest in water;
- 6 ♦ require persons who divert water to return the water to the public
7 unimpaired;
- 8 ♦ require that all branches of Colorado government protect and enforce
9 the public's interest in water; and
- 10 ♦ grant every Colorado citizen the right to sue the state for failing to
11 enforce the provisions in the measure.

12 **Summary and Analysis**

13 **Colorado's water supply challenges.** Colorado is a semi-arid state that receives
14 less average precipitation than most states in the country. It also periodically
15 experiences extended droughts. The majority of water in the state comes from snow
16 in the mountains. Consequently, most of the annual stream flow occurs during the
17 three-month spring run off, from May through July. To manage the state's
18 inconsistent water supply, over 2,000 dams and reservoirs have been constructed
19 throughout the state. The Continental Divide also separates much of Colorado's water
20 supply from its population centers. Approximately 80 percent of the rain and snow
21 falls in the state west of the divide, while most of the state's population lives on the
22 eastern side. Colorado is also the source for several major river systems including the
23 Arkansas, Platte, Colorado, and the Rio Grande that provide water to a number of
24 neighboring states.

25 **Colorado's water law.** Colorado's water law, called the doctrine of prior
26 appropriation, was developed to address the state's water supply challenges.
27 According to this law, a water right is a property interest that is separate from the land.
28 This allows water to be moved across the state from where it occurs naturally to where
29 it is needed. The law also allocates water during droughts and seasonal shortages
30 based on the seniority of a water right. The longer a water right has been used, the
31 more senior the right. Under the current system, a water right holder typically knows
32 whether water will be available to satisfy his or her need based on streamflow records
33 and the seniority of his or her right.

1 **Water rights and diversions.** A water right is created by using water for a legally
2 recognized use, such as for agricultural, industrial, domestic, and power generation
3 purposes. More recently, Colorado recognized water rights to protect stream flows
4 and lake levels, called instream flows, and water rights to protect stream flows for
5 kayaking and rafting, called recreational in-channel diversions. Once created, the
6 water right remains a property interest of its owner until the right is abandoned or
7 transferred to another water user. Water rights have been granted for most of the
8 stream flows in the state or obligated to downstream states by interstate compacts.

9 In addition to the water diverted from Colorado streams, water is also pumped
10 from deep underground rock aquifers, called nontributary ground water. These waters
11 include the Denver Basin aquifer that underlies much of the Denver metro area and is
12 primarily used by southern metropolitan communities. Ownership of nontributary
13 ground water is currently based on overlying landownership.

14 In general, only a portion of the water that is diverted from a stream or pumped
15 from an underground aquifer is consumed. For example, an acre of corn consumes
16 approximately 40 percent of the water applied to it, called depletion. The law currently
17 requires that the remaining 60 percent of the water taken from the stream, called
18 return flows, be allowed to return to the stream for use by others. However, return
19 flows from certain diversions, including transbasin diversions and water that is pumped
20 from nontributary aquifers, are not required to be made available for other users.
21 These waters can be used until they are fully consumed.

22 **State's role in the allocation of water.** The Department of Natural Resources'
23 Division of Water Resources and the state's water courts are primarily responsible for
24 the allocation of water in Colorado. The division administers waters in the state
25 according to the priority system by stopping diversions that injure senior water rights
26 or are not being used beneficially. Water court judges determine new water rights and
27 approve changes of water rights and plans to protect senior water rights. A water
28 judge may also order a water user to obey an order from the Division of Water
29 Resources to cease injury to senior water rights or to cease water uses that are not
30 being used beneficially. Another state agency, the Colorado Water Conservation
31 Board, has the unique authority to obtain instream flow rights.

32 **Limits on water use under Amendment __.** This measure requires that all water
33 diversions, including nontributary ground water, be returned unimpaired to the public,
34 potentially limiting the use of nontributary ground water, transbasin diversions, and
35 intensive water consuming activities, such as irrigation. This measure also limits water
36 diversions that impair the natural elements of the public's interest in water. In addition
37 to depleting stream flows, some water diversions may also affect water quality and
38 stream temperature. Specifically, return flows may carry sediments and nutrients back
39 to the stream. Reduced stream flows caused by water diversions may also increase
40 water temperatures and affect stream habitat. Consequently, this measure may limit
41 or prohibit diversions that significantly deplete streams flows, increase pollution, or
42 impair stream habitat.

1 **Arguments For**

2 1) Amendment __ gives the citizens of Colorado more influence over water
3 allocation decisions by granting every Colorado citizen the right to sue the state for
4 failing to enforce the provisions of the amendment. The current system prioritizes
5 historical water uses over newer water uses, such as for the environment and
6 recreation. This measure helps ensure that citizens have access to the court to
7 defend these new and important water uses.

8 2) Requiring used water to be returned to streams in an unimpaired state may
9 increase streamflows and improve water quality across the state. Higher streamflow
10 may improve conditions for recreational activities such as rafting and fishing, and
11 improve water depth and temperature which may help fish and wildlife, especially
12 during droughts. Existing water quality laws do not sufficiently protect public health
13 and the environment. The water quality of over 400 stream segments in the state is
14 considered "impaired" for purposes of the federal Clean Water Act.

15 3) The state's water allocation system needs to be updated to reflect new
16 challenges that Colorado water use is placing on the environment and public health.
17 The current water law system in Colorado has been in place since the 1800s when
18 there were fewer demands on water and the environment was healthier.

19 **Arguments Against**

20 1) Having a reliable water supply is important to the health and safety of all
21 citizens in the state, as well as to the state's economy. Amendment creates
22 uncertainty in the state's water supply system and may overburden the judicial system
23 with the number of legal challenges likely to occur as a result of this measure. The
24 measure creates a super water right over all water rights in the state which may lead
25 to litigation and possible reallocation of long held existing water rights, including those
26 held by water utilities serving residential and commercial customers, agricultural water
27 users, and industrial users. Moreover, the requirement that all water diversions be
28 returned unimpaired to the public may significantly limit the use of transbasin
29 diversions from west of the Continental Divide and nontributary ground water that are
30 essential to many of the state largest cities and fastest growing communities.

31 2) The language in Amendment __ is broad and undefined. Consequently,
32 Amendment __ gives too much power to the courts and the legislature to interpret key
33 phrases in the amendment, such as "irreparable harm" and "unimpaired." Additionally,
34 the measure broadly requires protection of the public's use and enjoyment of waters.
35 However, rafters use and enjoy water differently than farmers, and the measure does
36 not clarify which use is more beneficial to the public's interest. Ultimately, these
37 issues and others are likely to be addressed by litigation through the courts and laws
38 made by the legislature.

39 3) The measure is unnecessary because there are already sufficient laws to
40 protect water availability, quality, and the environment. The state already has an

1 instream flow program under which water rights are obtained by the Colorado Water
2 Conservation Board to keep minimum flows in stream segments and in natural lakes
3 to preserve or improve the natural environment. Water quality is protected through
4 the federal Clean Water Act and the state has water quality programs that monitor and
5 report on the quality of state waters, issue discharge permits to prevent water
6 pollution, and ensure that safe drinking water is provided from all public water
7 systems.