

Limits on Water Diversion

1 Amendment __ proposes amending the Colorado Constitution to:

- 2 ♦ expand public ownership to all waters in the state;
- 3 ♦ allow the state to limit or curtail any water use to protect, or prevent
- 4 irreparable harm to, the public's interest in water;
- 5 ♦ require persons who divert water to return the water to the public
- 6 unimpaired;
- 7 ♦ require that all branches of Colorado government act to protect and
- 8 enforce the public's interest in water; and
- 9 ♦ allow any Colorado citizen to sue the state to enforce the provisions in
- 10 the measure.

11 Summary and Analysis

12 **Overview of Colorado's water law.** A water right provides a water user the right
 13 to divert water for a legally recognized use, such as for agricultural, industrial,
 14 domestic, and power generation purposes. Over 150,000 water rights are currently
 15 owned by farmers, municipalities, homeowners, and other water users in Colorado.
 16 According to Colorado law, a water right is a real property interest that is separate
 17 from the land. This allows water to be moved across the state from where it occurs
 18 naturally to where it is used. Under current law, water is also administered during
 19 droughts and seasonal shortages based on the seniority of a water right. The earlier
 20 the date of the initial water use from a stream, also called an appropriation, the more
 21 "senior" the water right and the more valuable it is. Some of Colorado's most senior
 22 water rights date to the 1850s when the first appropriators used water for farms and
 23 mining operations.

24 Under the Colorado Constitution, water that is not claimed by a water right owner,
 25 called unappropriated water, is the property of the public; however, most of Colorado's
 26 water has been appropriated. Water rights have either been granted for most
 27 Colorado stream flows or the water is legally owed to downstream states. This
 28 measure extends the public's ownership to all waters, including waters that have been
 29 appropriated by public and private water rights owners. It also gives the public interest
 30 a priority over all other water uses in Colorado, including water used for irrigation and
 31 municipal, industrial, and residential purposes. Under this measure, a water right
 32 owner may be required to limit his or her water use to protect the natural environment
 33 and the public's enjoyment and use of water.

34 In addition to the water diverted from Colorado streams, water is also pumped
 35 from deep underground rock aquifers, called nontributary ground water. These waters

1 include the Denver Basin aquifer that underlies much of the Denver metro area and is
2 primarily used by southern metropolitan communities. Ownership of nontributary
3 ground water is currently based on overlying landownership. Under this measure,
4 public ownership of water is also extended to nontributary ground water.

5 **State's role in allocation of water.** Currently, the state is responsible for the
6 administration of water by stopping water uses that injure water rights or are not being
7 used beneficially. Water courts determine new water rights and approve changes of
8 water rights and plans to protect water rights from new uses. The state has the
9 unique authority to obtain water rights that help protect minimum stream flows and
10 lake levels, called instream flow water rights, and provides funding for water
11 development projects and studies. The state is also authorized to enforce federal
12 clean water requirements and regulate water pollution discharges from municipal
13 water treatment facilities, mining operations, oil and gas development, and other
14 sources. This measure requires that all branches of Colorado government protect and
15 enforce the public's rights and interest in water.

16 **Limits on water use under Amendment __.** This measure requires that all water
17 diversions, including nontributary ground water, be returned unimpaired to the public,
18 and it limits water diversions that impair the natural elements of the public's interest in
19 water. In addition to depleting stream flows, some water diversions may affect water
20 quality and stream temperature. For example, water used to water a lawn may carry
21 sediments and pollutants back to the stream. Reduced stream flows caused by water
22 diversions may also increase water temperatures and affect stream habitat.

23 *For information on those issue committees that support or oppose the*
24 *measures on the ballot at the November 6, 2012, election, go to the*
25 *Colorado Secretary of State's elections center web site hyperlink for*
26 *ballot and initiative information:*
27 www.sos.state.co.us/pubs/elections/Initiatives/InitiativesHome.html

28 **Arguments For**

29 1) Amendment __ gives the citizens of Colorado more influence over water
30 allocation decisions by granting any Colorado citizen the right to sue to enforce the
31 provisions of the amendment. The current system prioritizes historical water uses
32 regardless of whether the use is in the public interest. This measure ensures that
33 citizens have access to the court to defend the public's ownership rights and interests
34 in its waters.

35 2) Requiring used water to be returned to streams in an unimpaired state may
36 increase streamflows and improve water quality across the state. Higher stream flow
37 may improve conditions for recreational activities such as rafting and fishing, and
38 improve water depth and temperature which may help fish and wildlife. Existing water

1 quality laws do not sufficiently protect public health and the environment. The water
2 quality of over 400 stream segments in the state is considered "impaired" by the state.

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

7 **Arguments Against**

8 1) The measure creates a currently undefined state interest and makes it superior
9 to all water rights in the state, which may make it difficult for water users to plan for the
10 future. A reliable water supply is essential to the health and safety of all citizens in the
11 state, as well as to the economy. The measure may lead to litigation and possible
12 reallocation of long-held existing water rights, including those held by water utilities
13 serving residential and commercial customers, agricultural water users, and industrial
14 users. The measure changes the way deep ground water is allocated and potentially
15 undermines the water supply for the southern Denver metro area. As a result, the
16 cost of providing a secure water supply may increase.

17 2) The requirement that all water be returned to the public unimpaired may lead to
18 prohibitive water treatment costs for utilities and agricultural water users. These costs
19 may be passed on to the taxpayer or utility customer and make agricultural water use
20 impractical. Furthermore, stream health is already protected through various state
21 and federal water quality programs. The quantity of water in streams is additionally
22 protected through the state's instream flow program, under which water rights are
23 obtained to keep minimum flows in stream segments and in natural lakes to preserve
24 or improve the natural environment.

25 3) Amendment __ creates regulatory uncertainty as the state's numerous laws to
26 protect water availability, water quality, recreational use, public access, and the
27 environment are reinterpreted through the courts. The measure broadly requires
28 protection of the public's use and enjoyment of waters. However, rafters use and
29 enjoy water differently than farmers, and the measure does not clarify which use is
30 more beneficial to the public's interest, or offer any remedy when the public's use and
31 enjoyment of water inevitably changes.

32 **Estimate of Fiscal Impact**

33 *[A summary of the fiscal impact will be provided in the third draft.]*