

Use of Colorado Water Streams

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

- 2 ♦ create a public trust doctrine for Colorado's water by granting the public
3 certain ownership rights in the waters of the state's natural streams;
- 4 ♦ make the public ownership of water legally superior to all water rights,
5 contracts, and property law, and prohibit the state from transferring its
6 water rights;
- 7 ♦ grant unrestricted public access to any natural stream up to the
8 naturally wetted high water mark;
- 9 ♦ require that all branches of Colorado government protect and enforce
10 the public's interest in water; and
- 11 ♦ grant every Colorado citizen the right to sue the state for failing to
12 enforce the provisions in the measure.

13 **Summary and Analysis**

14 **Overview of Colorado's water law.** Over 150,000 [to be confirmed] water rights
15 are currently owned by farmers, municipalities, homeowners, and other water users in
16 Colorado. According to Colorado law, a water right is a property interest that is
17 separate from the land. This allows water to be moved across the state from where it
18 occurs naturally to where it is needed. Current law also allocates water during
19 droughts and seasonal shortages based on the seniority of a water right, called the
20 doctrine of prior appropriation. The earlier the date of the initial water use from a
21 stream, also called an appropriation, the more "senior" the water right and the more
22 valuable it is. Some of Colorado's most senior water rights date to the 1860s when
23 the first appropriators used water for farms and mining operations. More recently,
24 Colorado has allowed water rights to be granted for environmental and recreational
25 purposes.

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

1 **Effect on water rights under Amendment __.** Amendment __ creates a public
2 trust doctrine to protect the public's interest in water. Water used for the environment
3 and public health is granted a priority over all other water uses in Colorado, including
4 water used for irrigation and municipal, industrial, and residential purposes.
5 Consequently, any water right owner may be required to limit his or her water use if it
6 would harm the natural environment or human health.

7 **Public access to Colorado streams.** This measure requires that the public be
8 allowed access to all streams and stream banks in the state up to the high water mark
9 of the stream. It also declares that the natural streams and their banks are public
10 highways for commerce and public use. Under current law, the beds and banks of
11 larger, navigable streams are owned by the state and are generally open to boaters
12 and anglers. If a stream is smaller and nonnavigable, the owner of the adjoining
13 property owns the beds and banks of the stream and may prohibit public access to the
14 stream.

15 **Arguments For**

16 1) Amendment __ gives the citizens of Colorado more influence over water
17 allocation decisions by granting every Colorado citizen the right to sue the state for
18 failing to enforce the provisions of the amendment. The current system prioritizes
19 historical water uses over newer water uses for the environment and recreation. This
20 measure helps ensure that citizens have access to the court to defend these new and
21 important water uses.

22 2) Amendment __ opens all streams that face restrictions under current law to
23 recreational activities such as fishing, rafting, and wading. Under current law, private
24 property owners may prohibit recreational water users from touching the bed or banks
25 of streams on private property, making many of these activities not possible. Many of
26 the state's best fisheries and white water are on private property and are closed to the
27 public. Amendment __ would allow public access to the bed and banks of all streams
28 in the state.

29 3) The state's existing water laws are insufficient to protect the environment and
30 the public's interest in water. The water rights for the state's instream flow program
31 are generally junior rights and may not prevent senior water right holders from using
32 water during water shortages. Colorado's current water law system has been in place
33 since the 1800s and needs to be updated to address new challenges that the state's
34 water use is placing on the environment and public health.

35 **Arguments Against**

36 1) Having a reliable water supply is important to the health and safety of all
37 citizens in the state, as well as to the state's economy. Amendment __ creates
38 uncertainty in the state's water supply system and may overburden the judicial system
39 with the number of legal challenges likely to occur as a result of this measure. The

1 measure creates a super water right over all water rights in the state which may lead
2 to litigation and possible reallocation of long-held existing water rights, including those
3 held by water utilities serving residential and commercial customers, agricultural water
4 users, and industrial users. Moreover, the measure may also lead to litigation over the
5 meaning of undefined key phrases in the amendment such as "public estate," "natural
6 streams," and "naturally wetted high water mark."

7 2) Amendment __ negatively impacts the rights of private property owners. The
8 measure puts long-held water rights into jeopardy, many of which are essential to the
9 economic livelihood and lifestyle of water right holders. It also limits the ability of
10 private landowners to restrict access to streams flowing across their property even if
11 there are no recreational opportunities available or if such access impacts sensitive
12 habitat. As a result, conflicts between property owners and the public may increase.

13 3) Amendment __ is unnecessary because there are already sufficient laws to
14 protect water availability, quality, and the environment. The state already has an
15 "instream flow" program under which water rights are provided to keep minimum flows
16 in stream segments and in natural lakes to preserve or improve the natural
17 environment. Water quality is protected through the federal Clean Water Act, and the
18 state has water quality programs that monitor and report on the quality of state waters,
19 issue discharge permits to prevent water pollution, and ensure that safe drinking water
20 is provided from all public water systems.