

Use of Colorado Water Streams

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

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

12 **Summary and Analysis**

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

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

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

11 **Public access to Colorado streams.** Under current law, the beds and banks of
12 larger, navigable streams are owned by the state and are generally open to boaters
13 and anglers. If a stream is smaller and nonnavigable, the owner of the adjoining
14 property owns the beds and banks of the stream. Current law is silent on whether land
15 owners may exclude boaters on nonnavigable streams if they do not touch the beds or
16 banks. This measure requires that the public be allowed access to all streams and
17 stream banks in the state up to the "naturally wetted high water mark of the stream."
18 It also declares that the natural streams and their banks are public highways for
19 commerce and public use.

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

25 **Arguments For**

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

32 2) Amendment __ opens all public waters that face restrictions under current law
33 to recreational activities such as fishing, rafting, and wading. Under current law,
34 private property owners may be able to prohibit recreational water users from touching
35 the bed or banks of streams on private property, making many of these activities not
36 possible. Some of the state's best fisheries and white water are on private property
37 and are closed to the public. Amendment __ would allow public access to the bed and
38 banks of all streams in the state.

1 3) The state's existing water laws and public health and environmental protection
2 laws are insufficient to protect the environment and the public's interest in water.
3 Under Amendment __, the state would be required to protect the public's enjoyment
4 and use of water, which may provide better water quality and leave more water in
5 streams for recreation and wildlife.

6 **Arguments Against**

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

14 2) Amendment __ creates regulatory uncertainty as the state's numerous laws to
15 protect water availability, water quality, recreational use, public access, and the
16 environment are reinterpreted through the courts. The measure broadly requires
17 protection of the public's use and enjoyment of waters. However, rafters use and
18 enjoy water differently than farmers, and the measure does not clarify which use is
19 more beneficial to the public's interest, or offer any remedy when the public's use and
20 enjoyment of water inevitably changes.

21 3) Amendment __ allows unrestricted public access to streams, creating issues for
22 watershed protection, public safety, liability, and damage to sensitive habitat. The
23 measure negatively impacts the rights of private and public property owners and takes
24 away their ability to limit access to streams flowing across their property even if there
25 are no recreational opportunities available or if such access impacts sensitive habitat.
26 As a result, conflicts between property owners and the public may increase.

27 **Estimate of Fiscal Impact**

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