

Highlights from the Sponsors Answers to the Review and Comments Questions from the Staff of Colorado Legislative Counsel and the Colorado Office of Legislative Legal Services

Initiative to Adopt the Colorado Public Trust Doctrine

A “public trust doctrine” concept is largely a broad and relatively sweeping, somewhat undefined, concept of natural resource law and regulation that has, at its core, a concept that the state is to be directed to acknowledge the state’s stewardship responsibilities regarding the public’s ownership and interests in the public estate. The adoption of this Colorado Public Trust Doctrine would infer that not only is a water right not absolute, but also, that a water right is a usufruct right that is servient to the public’s water estate as a matter of law, and that by leaving water in place, rather than it being diverted, could be a valued element of the public’s interests in their water. Adoption of this Colorado Public Trust Doctrine will mandate and necessitate review of water rights allocated where the public’s waters have been put through the appropriation system. In administering the trust, the state is not burdened with an outmoded classification favoring one mode of utilization over another.

. . . certain lands uses and water uses are contravening the intent and purposes of this Colorado Public Trust Doctrine and are, therefore, to be rejoined in the public estate . . .with the understanding that those uses had been, and are, impressed with a pre-existing condition of the dominance of the public ownership right of water . . .

. . . the Colorado Supreme Court gave the public’s waters to the users so that now a private property water usufruct-right user has a greater “right” in water than do the real owners of the water – the public. And it is at this point where the Colorado Supreme Court in the People v. Emmert decision erred.

The Legislative Declaration of the Colorado Water Quality Act is in conflict with proposed provisions of the Colorado Public Trust Doctrine due to the declaration in the act that there is a requirement to “reasonably protect” the uses of such waters. No declaration of “economic reasonableness”, permitting the contamination or pollution of the waters that could limit public enjoyment of their resource is to be permitted. . . No government action that adversely impacts the natural environment, or impacts the people’s aesthetic enjoyment of their resources, or affects the public’s health would be without error.

Could the proposed initiative be used to abrogate, invalidate, impair, or interfere with prior, vested water rights? YES

Could the proposed initiative be used to alter the timing or decrease the amount of diversions of prior, vested water rights? YES

Most water uses, such as irrigation, consume part of the water that is diverted. For example, more than 40 percent of the water that is diverted to flood-irrigate alfalfa may be lost to a stream through evaporation and plant uptake. Does this measure have the potential to prohibit or otherwise limit consumptive uses? YES