February 2003
Vol. 32, No. 2
Specialty Law Columns
Real Estate Law Newsletter

Changes to Colorado's Conservation Income Tax Credit Law

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UPDATED VERSION - MARCH 2003

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The amount of state income tax credit available to Colorado taxpayers through contributions of qualified conservation easements increased as of January 1, 2003. This article reviews changes to Colorado's conservation income tax credit law and addresses issues raised by such changes.

On January 1, 2003, the amount of state income tax credit available for Colorado taxpayers donating perpetual conservation easements on their Colorado properties increased from $100,000 to $260,000. House Bill ("H.B.") 01-1090 effectuates this increase and makes other changes to the state's conservation tax credit.1

A conservation easement is a contract between a landowner and a nonprofit land trust or government entity that places permanent, perpetual restrictions on the use and development of the landowner's property. Conservation easements are designed to protect certain defined qualifying conservation values that are on the property.2

This article provides a summary of past and present revisions to the state income tax credit. It examines the details of benefits and consequences of the tax credit, both intended and unintended. The article interprets the tax credit as a strong incentive and motivating factor for taxpayers considering donating conservation easements. Finally, it discusses several unintended consequences of the Colorado conservation income tax credit.

Conservation Tax Credit Background
Since the 1980s, Colorado has provided tax incentives to landowners for donating perpetual conservation easements in gross on their Colorado properties. Most incentives took the form of income tax deductions that mirror those offered by the Internal Revenue Code ("Code" or "IRC") § 170(h).3 Similar to the federal incentives, Colorado tax laws were designed to encourage conservation of property by landowners who otherwise might not consider doing so. The added benefit consisted of favorable tax treatment based on the charitable contribution of conservation easements by landowners or their estates.4

Although the laws successfully provided an offset to income for certain Colorado landowners, they did little for Colorado's land-rich, but cash-poor landowners, such as farmers and ranchers. Generally, the tax laws did not put money in the pockets of these Coloradans.

Beginning in 1999, several Colorado legislators took strides to assist their agricultural constituents. An incentive system of state income tax credits was created by H.B. 99-1155 to provide a source of income for Colorado landowners donating easements on properties in the state.5 Unlike deductions against income, these credits were designed not only to be used as a dollar-for-dollar reduction of Colorado income tax, but also to be transferred (sold) to third parties.

In later incarnations of the law, tax credits were created to allow taxpayers the right to claim a refund from the state during years of budget surplus.6 Thus, Colorado hurdled itself to the forefront of the national conservation movement with its forward-looking, albeit untested, conservation easement tax credit. Colorado continues to lead the nation in creating a process whereby taxpayers may transfer or rebate conservation tax credits.

Conservation Easements and Tax Credit Overview

The process of establishing a conservation easement works as follows. A landowner interested in protecting his or her agricultural, open space, historic, or wildlife habitat property works with a nonprofit land trust or government entity, such as an open-space program. They craft a deed of conservation easement that will identify future permitted and prohibited uses of the landowner's property.7

Through the language of the easement, the landowner relinquishes certain rights to develop his or her property. In exchange, the organization receiving the easement promises to ensure that land use activities of the landowner, and all future landowners, comply with the uses described in the deed of conservation easement.8

If no money is paid to the landowner for the easement, this process is considered the donation of a conservation easement as a charitable gift to the organization. The process is similar in character and treatment to the donation of a valuable painting to a museum.9 In return for the donation, the landowner receives federal and state income tax deductions equal to the value of the easement, with certain other limitations. He or she may carry over the deductions for a period of five years after the year of donation.10

The value of the donation is determined by taking the value of the subject property before and after the donation of the conservation easement. The value of the property after certain development rights are relinquished is subtracted from the full fair market value of the property prior to relinquishment.11
In the future, a landowner also will receive a reduction in estate taxes due to the reduction in value of the estate by virtue of removing certain development potential. The landowner may qualify for additional estate tax conservation incentives.12

Colorado Tax Credit
Legislation 1999 to 2001

In addition to a federal income tax deduction and federal estate tax incentives and reductions, a Colorado landowner could benefit by selling a state income tax credit or by receiving a refund for a state income tax credit equal in value to that of the donated conservation easement.13 Between January 1, 2000 and December 31, 2002, the maximum allowable amount available was $100,000 of the value of the easement donated. Thus, to qualify for the full amount of the credit, the conservation easement would need to have a value of at least $100,000.14

The amount available for a transfer (sale) to other Colorado taxpayers was a minimum of $20,000, less taxes owed by the original taxpayer.15 The taxpayer had twenty years to make use of the credit such that any portion of the credit not transferred, used against his or her own taxes, or both, could be carried forward for a period of twenty years after the year of donation of the conservation easement.16 Any remainder of the credit would, however, terminate if a taxpayer died before completely making use of it during the relevant twenty years of his or her lifetime.17

A taxpayer could take only one credit per tax year per donation and was prohibited from using the $100,000 value used to generate a tax credit for an additional Colorado charitable income tax deduction.18 Taxpayers were instructed to submit a qualified appraisal of the conservation easement, as required by a Treasury Regulation, to demonstrate the value of the conservation easement donation triggering the tax credit.19

During the 2000 legislative session, the legislature amended and expanded the conservation tax credit legislation through H.B. 00-1348, effective August 2, 2000. That bill allowed taxpayers the right not only to transfer their credit, but also to take from the state a refund up to the maximum allowable amount of $100,000, in $20,000 increments per year, less taxes owed by the taxpayer—*but only during years of budget surplus*.20 Taxpayers were to pay their own taxes out of the credit before applying for a refund. Further, they were not allowed to combine the refund with a transfer of the credit. It was an either-or proposition: either apply for the refund against the credit or transfer (sell) the tax credit.21

H.B. 00-1348 further clarified the transferability of the credit. The bill established that although taxpayers could elect to transfer all or part of their $100,000 credit, they could not transfer the credit in increments less than $20,000. In addition, any transfer would take place only after a taxpayer's own state tax burden was paid off the top.22 The election to take a refund was to be made available only to the original donor of a conservation easement.23 Thus, transferees or buyers of the credits were instructed that they were ineligible to apply for a refund by virtue of having purchased a credit.

Both the buyer and seller of a tax credit were required to submit written statements with their tax returns, indicating the amount of credit used against taxes, amount of credit bought, and amount of credit sold (amount transferred).24 Further, pass-through taxation entities, such as partnerships and limited liability companies ("LLCs"), were given the guidance that the pass-through entity could take a maximum amount of $100,000 per year, per donation and per entity (as opposed to each holder in the entity being eligible for his or her own $100,000 credit). Passing through of the credit to individual partners or members would be in proportion to their shares in the entity.

During both versions of the conservation tax credit law—H.B. 99-1155 (effective January 1, 2000) and H.B. 00-1348 (effective August 2, 2000)—taxpayers continued to be allowed to carry forward unused credits. They could rebate, transfer, or apply the credits to their own state income taxes for a period of twenty years after the year of easement donation.25 Further, before a taxpayer was eligible for another credit through the donation of a subsequent conservation easement, he or she was to make use of his or her entire credit through payment of personal taxes, sale of the credit to another taxpayer, or refund of the credit.26

The Colorado conservation tax credit legislation allowed taxpayers to take refunds of their credits from the state during years of budget surplus and to sell their credits to other Colorado taxpayers during years of state budget deficit. A taxpayer could reasonably expect to broker his or her credits for about eighty cents on the dollar—with 10 cents on the dollar (or a 10 percent reduction) offered to attract buyers; and 10 cents on the dollar (or a 10 percent commission) taken by a broker.27 Taxpayers who knew other taxpayers who might be interested in buying their credit could avoid a broker's surcharge by exchanging the credits themselves.

From the perspective of the buyer, purchasing a value of $100,000 in tax credits for $90,000 was a savings of $10,000 tax per credit purchased. There was no limit on the amount of tax credits a buyer could purchase.28 Because the purchasers of these credits likely had to pay state income taxes, they had reason to take advantage of the bargain offered by conservation tax credits.

From the tax credit seller's perspective, significant monetary value was given up by relinquishing development rights on the property—possibly well in excess of $100,000. Thus, it did not hurt to receive some actual income in return for that relinquishment, although $100,000 taken in refunds (or $80,000 to $90,000 received for transfer) was still relatively little compensation when compared with the value of the land on which easements were donated.

Changes in Colorado
Tax Credit in 2003
Legislators addressed the shortfall in funds available to the easement-donating taxpayer by significantly amending the conservation credit law in H.B. 01-1090. Although ratified in 2001, these changes were not slated to go into effect until January 1, 2003.29 This time, legislators sweetened the credit by: (1) increasing the maximum allowable amount from $100,000 to $260,000; (2) increasing the maximum amount of the refund limit to $50,000 and specifying that entities or married couples are limited to that amount;30 and (3) eliminating the $20,000 minimum amount of credit transfer.31 Of importance in interpreting the new legislation are definitions of "taxpayer" and other significant terms. (*See* "Definitions and Interpretation of New Legislation," *below*.)

Tax Credit Increase
As of January 1, 2003, a landowner donating a conservation easement is eligible for a tax credit of up to $260,000 of the value of the donated easement.32 However, unlike the first $100,000, the second $160,000 is not a dollar-for-dollar value; it is a 40 cents on the dollar value.33 Therefore, mathematically, it now takes $500,000 of value of a donated conservation easement to allot a $260,000 credit:

- 40 percent x $400,000 = $160,000
- $160,000 + $100,000 = $260,000
- $400,000 + $100,000 = $500,000

Rising land values in Colorado make even this increased maximum allowable value easily attainable through donation of a conservation easement. To address any confusion regarding the location of properties qualifying for contribution, the law now specifies that such donations qualify only if they occur on Colorado properties.34

Easement donors seeking the tax credit now must submit to the Colorado Department of Revenue ("CDOR") a summary of a qualified appraisal, as opposed to a complete appraisal, to support the value of the easement.[35] Originally, H.B. 01-1090 also contained a provision that allowed donors to include 50 percent of transaction costs incurred in donating the easement (such as surveyor fees, appraisal fees, attorney fees, accountant fees, closing costs, and title insurance) when submitting a tax request to the CDOR; however, this provision did not survive committee and was stricken from the bill just prior to enactment.36

Entities, Married Couples,
And Refund Limits
The 2003 credit law reinforces that partnerships, S corporations, LLCs, and other similar pass-through entities donating easements on or after January 1, 2003, will take only one credit per entity. The entity will pass that credit through to its partners, shareholders, or members in proportion to their distributive shares of the entity.37 Similarly, husbands and wives donating conservation easements on their Colorado properties and filing income taxes jointly or separately will be treated as one taxpayer. Thus, a couple is eligible for only one tax credit.38

If the pass-through entity or married couple chooses a refund of the tax credit during years of state budget surplus, the refund may not exceed $50,000 dollars in the aggregate for the entity or married couple.39 However, it is likely that the Colorado budget deficit will be increasing in the short term. As such, the rebate/refund option will not be available for taxpayers until the state is in the black.40 Those electing refunds (whenever they again become available) may take comfort in knowing that the amount of their refund will not be added back into their Colorado taxable income.41

Elimination of Minimum
Credit Transfer
The minimum threshold amount available for transfer has been eliminated. This will benefit those interested in purchasing a credit for taxpayers with tax burdens of less than $20,000.42 Credit purchasers will be encouraged to buy as many credits as needed to absorb their tax burden because the law does not limit the number of credits they may buy.43

Definitions and Interpretation of New Legislation

Critical to the implementation of the income tax credit law is the definition of who is an eligible "taxpayer" for a tax credit. This issue will become relevant when considering the unintended consequences of the credit law (*discussed below*). The credit law defines "taxpayer" as:

> a resident individual, or a domestic or foreign corporation, . . . a partnership, S corporation, or other similar pass-through entity, estate, or trust that donates an easement as an entity, and a partner, member, and Subchapter S stockholder of such pass-through entity.44

The terms used to define "taxpayer" in the tax credit law are elsewhere defined in the Colorado statutory provisions for Colorado taxpayers.45 A "resident individual" is defined as a natural person domiciled in Colorado, who maintains a permanent place of residence in Colorado, and who spends more than six months of a taxable year in the aggregate in Colorado.46

A "partnership" is any group or organization defined as a partnership by IRC § 761(a) and required to file a partnership return as such.47 A "resident partner" is a partner who is a: (1) resident individual; (2) domestic corporation; (3) "resident estate," which is the estate of a decedent administered in Colorado with administration as a non-ancillary proceeding; (4) "resident trust," which is a trust administered in Colorado; (5) partnership organized under Colorado law; (6) LLC organized under Colorado law;48 or (7) S corporation, which is a corporation that made a valid election pursuant to IRC § 1362(a).49

Because only Colorado taxpayers are eligible for tax credits, donors of easements seeking a tax credit must fall into one of the above definitions. However, it is important to note that members of pass-through entities organized under Colorado law may receive credits by virtue of their membership in such an entity, regardless of whether such members are themselves Colorado residents.50

After the passage of H.B. 01-1090 on June 1, 2001,51 but prior to its effective date (January 1, 2003), several sources emerged to clarify and provide interpretation of the credit law's definitions, reach, and impacts. These included the Internal Revenue Service ("Service"), CDOR, and Colorado legislature.

The Service released a Technical Assistance Memorandum on May 31, 2001. That memorandum clarified that use of a credit to pay Colorado income tax would not be viewed as a reduction in the tax owed by the person using the credit, which subsequently would reduce his or her federal itemized deduction. This determination is an important component to the federal incentives for charitable conservation contributions. Reducing the tax owed and the itemized deduction on an individual's federal return likely would operate as a strong disincentive to individuals interested in applying for the state tax credit.52 Instead, state tax liability, even when paid with a credit, will continue to be deductible in the eyes of the Service.53

During the subsequent legislative session, and still in advance of the effective date of H.B. 01-1090, another bill went into effect. H.B. 02-1098, effective August 7, 2002, provided that a credit generated by an easement donated after January 1, 2000 (retroactively) and after January 1, 2003 (prospectively), is allowed only for a donation that is eligible as a "qualified conservation contribution" pursuant to IRC § 170(h) and any federal regulations associated therewith.54 Practically, this meant that to qualify for tax credits, easements donated in Colorado must qualify as "qualified conservation contributions."55

At the federal level, and in Colorado by extension, qualified conservation contributions must be donated for specific and enduring conservation purposes to protect specific and enduring conservation values. Such contributions may not allow destruction of conservation purposes and values by future development. Additionally, the contributions may not allow permitted uses that would be inconsistent with the protection and preservation of the conservation purposes and values of the contribution.56

Further, an attractive income tax deduction available at the federal level that may serve as a motivating factor and incentive for donors of conservation easements has been found not to vitiate the charitable nature of the contribution.57 This raises an important issue when considering motivation as it relates to the tax credit and its unintended consequences, discussed later in this article.58

In July 2002, the CDOR issued a publication that explained several issues relating to the conservation easement credit.59 These include the following: (1) credits may be transferred only once; (2) should a credit be disallowed after an audit at the state level, the buyer of the credit is liable for the payment of taxes; (3) to claim a credit for a certain tax year, the buyer must buy the credit prior to the end of that tax year; and (4) credits may be used only one at a time such that taxpayers will not be eligible for additional credits until they have either made use of the credit themselves, or transferred it to someone who has made use of the credit.60

Therefore, although landowners may make donations of conservation easements over time, their donations will be eligible for additional credit only when they have no carryover of a prior credit.61 Further, the CDOR has proposed regulations to provide additional guidance to taxpayers' understanding of the whole universe of the Colorado conservation tax credit.62

Unintended Consequences Of Income Tax Credit

Several significant unintended consequences have evolved since the passage of the conservation credit law. These consequences include: (1) manufacturing of "taxpayers"; (2) fragmentation of real property; and (3) potential "abuse" of the credit law.

Incentive to Qualify As Taxpayer

As mentioned above, how a "taxpayer" is defined is important in the context of the credit law because only Colorado taxpayers qualify for the credit. The credit law created an incentive for people to become Colorado taxpayers. A significant, yet currently anecdotal, consequence of the credit law involves the creation of pass-through entities such as partnerships and LLCs under Colorado law for the sole purpose of qualifying partners and members for tax credits. These entities may be created to hold real property in Colorado on which conservation easements may be donated, but the partners or members might not themselves be Colorado residents.

In this scenario, although more Colorado "taxpayers" are being manufactured, they may not have any tax liability to the state. Thus, there would be more people and entities eligible to sell tax credits or take a refund without generating significant return to the state. As a result, more money may be leaving state tax coffers because: (1) individuals and entities may take refunds against the state during years of budget surplus; and (2) individuals and entities may buy credits and no longer pay taxes into the state because of the purchased tax credits. The practical effect of this increasing number of eligible taxpayers could be a possible drain of state resources without clear opportunities for replenishment.

This unintended consequence may require a tightening of the language of the credit law through further qualification and definition of what it is to be a Colorado taxpayer. The concern already has prompted clarification in the CDOR's proposed regulations, which make clear among other things, that non-recognized entities, such as single-member LLCs, will not be eligible for tax credits unless the sole members are Colorado residents. Additionally, certain part-time residents' donations of conservation easements will not be recognized as eligible for tax credits unless donated while the owners are considered Colorado residents.63

Fragmentation of Real Property

The second unintended consequence of the credit law involves the fragmentation of real property in Colorado. Such fragmentation can occur by: (1) dividing single-owner land into multiple ownerships; (2) over time, phasing in easements on small pieces of an original parcel; or (3) a combination of both.

The first form of fragmentation occurs when land previously owned by one owner is divided into multiple ownerships, with separate entities or individuals owning distinct, independent pieces of the original parcel. Presuming each parcel and accompanying easement is a "qualified conservation contribution," every entity or individual would qualify as a taxpayer and possibly qualify for a tax credit.

With such fragmentation, it is foreseeable that each owner/taxpayer might want to make a donation of a conservation easement to become eligible for a tax credit. All of these donations might take place in the same tax year. Various owner/taxpayers donating multiple conservation easements in the same year that stem from the same original parent parcel contrasts past practice, where one owner donates one conservation easement on the entirety of one original parcel, thereby generating only one tax credit.

The second form of fragmentation of land occurs when the original property owner/taxpayer maintains sole ownership of the parcel, but phases donation of multiple conservation easements over time on small pieces of the original parcel. This would fragment the land into parcels of a size so that each possesses just enough conservation value to qualify as a "qualified conservation contribution" and generate the value needed for the maximum amount of credit.

The process of phasing multiple easements over time by the same property owner/taxpayer to generate multiple tax credits is not dissimilar from some taxpayers' approach to the income tax deduction and five-year carryover. It presumes that the owner/taxpayer can make use of the credit each year or transfer the credit to a taxpayer who can. Each credit must be completely used before an easement donor owner/taxpayer becomes eligible for a subsequent credit.64 Landowners have been known to donate easements in phases to make use of their federal income tax deductions over the five-year carry-over, in addition to the year of donation.65

Finally, land could be fragmented both in ownership and through the donation of multiple easements over time. If the original landowner divides the land among various independent owner/taxpayers, each could elect to phase multiple easements over multiple years for multiple tax credits, rather than donate one easement for a one-time tax credit. This scenario presents the most complicated and perceptibly aggressive application of the tax credit law. It presumes not only that each individual taxpayer qualifies for a tax credit, but that each parcel on which an easement is donated qualifies by virtue of its conservation value and purpose as a "qualified conservation contribution."

Perceived "Abuse" of Income Tax Credit

There is growing concern among members of the conservation community about the "abuse" or perceived "abuse" of the credit law. This would occur through fragmentation of ownership of land, as well as the fragmentation of large parcels of land into small parcels with suspect conservation values.

Fragmentation makes more work and is less efficient for those responsible for monitoring easements and enforcing rights against landowners than the large parcel, single-owner donations. However, the conservation community fears not so much that the process will be inefficient and onerous, but that the conservation credit itself will be a motivating factor for those considering donating conservation easements on their land, rather than protection of the inherent conservation values.

To date, the Service has issued one Technical Assistance Memorandum advising Coloradans how their credit law operates in concert with the federal income tax process.66 It is possible that any perceived or actual "abuse" of the credit law may lead to further federal and state review of the Colorado conservation tax credit, with less-than-positive results for donors of conservation easements.

If, in addition to determining conservation values of real property, land trusts and government entities agree to determine the subjective intent and motivation of a conservation easement donor,67 the relevant inquiry should parallel that at the federal level. Accordingly, the question should be whether "a donor has any expectation of direct or indirect economic benefit from making the donation, *aside from a tax deduction*."68 (*Emphasis added.*) In other words, the desire for a tax *deduction* is a legitimate reason to make a donation of a conservation easement.

If the expectation of economic benefit through receipt of tax credits is analogous to the permissible expectation of economic benefit derived from tax deductions, intent and motivation of the conservation easement donor should be relevant only to the extent the donor has an expectation of economic benefit *aside from a tax credit*. Thus, the fact that a donor may be motivated solely by tax credits should not be understood to defeat the charitable intent of a donor making a conservation easement contribution.69

The fact that tax credits are incentives for the donation of easements on smaller parcels of land or land owned by multiple owners should not be used as a means to discourage such donations. In fact, motivation of potential donors by the tax credit incentive is a tribute to the success of the incentive itself. After all, the motivation is a tax credit incentive designed both to mimic and expand on federal tax deduction incentives—and it is doing just that.

If the tax credit incentive causes Colorado taxpayers to conserve Colorado properties that they would not otherwise have conserved and, at the same time, provides a new source of income for such taxpayers, the tax credit is accomplishing exactly what its sponsors intended. It brings Colorado taxpayers—and more important, additional Colorado properties—to the conservation arena.

If the concern is fragmentation of land and ownership and size of donations, there are other possible solutions. For example, there could be an amendment to the incentive itself to provide a dollar-for-dollar match up to $500,000, instead of $100,000, to remove the incentive to split parcels into $100,000 fragments. In the alternative, it would be possible to maintain the refund amount at forty cents on the dollar, so that in years of surplus, $260,000 is available for a refund in $50,000 increments based on a $500,000 easement donation.70 At the same time, the dollar-for-dollar match could be increased to $500,000 for transfers of the credit in non-surplus years, or in all years.

Such approaches would decrease the motivation to fragment land because the $500,000 dollar-for-dollar match would more closely represent Colorado land sizes and values. If fragmentation were to occur at all, it may be in larger parcel increments.

Conclusion

The Colorado conservation tax credit encourages Colorado landowners, including land-rich and cash-poor farmers and ranchers, to conserve their Colorado properties in exchange for monetary benefit. Whether landowners choose to fragment ownership of their properties or phase donation of their easements over time, the end result remains the same: more Colorado properties conserved and more dollars in the pockets of Colorado landowners.

Although the Colorado conservation tax credit has taken various forms over the past several years and may yet undergo more revisions and amendments, it remains a strong incentive for Colorado landowners to donate conservation easements. With the January 1, 2003, effective date of H.B. 01-1090, it has become an even more powerful incentive.

NOTES

1. H.B. 01-1090, codified in amended CRS § 39-22-522 (signed into law June 1, 2001; effective Jan. 1, 2003). The delay between the passage of this law and its implementation was largely because the tax credit was characterized as a "tax cut" subject to the state's TABOR amendment to the constitution. Colo. Const. Art. X, § 20. Thus, earlier implementation of the tax credit might have upset the delicate balance between tax refunds and state revenues proscribed by the TABOR amendment. Legislators had to ensure that the reduction in the tax refund to taxpayers was in an amount equal to the reduction in General Fund income tax revenue so that the net effect of the tax credit and other tax reductions slated to go into effect after 2001 would not result in a net decrease in taxes paid by all taxpayers over time but would operate to shift this tax burden away from the taxpayer to the state. *See* "Tax Reduction Measures Passed in 2001," *Colorado Legislative Council Staff Issue Brief* 2 (June 13, 2001).
2. *See* Jay, "Land Trusts, Landowners, and Conservation Easements" (2002) at http://www.conservationlaw.org.
3. CRS §§ 38-30.5-100 *et seq.*; IRC § 170(h). All references to IRC sections are to the Internal Revenue Code of 1986, as amended.
4. CRS §§ 38-30.5-100 *et seq.*; IRC § 170(h). For a discussion of conservation easements in an estate planning context, *see* Dow, "The Unique Benefits of Conservation Easements in Colorado," 30 *The Colorado Lawyer* 49 (Dec. 2001).

5. H.B. 99-1155, codified in amended CRS § 39-22-522 (effective Jan. 1, 2000) (designed to provide tax credit against Colorado income tax for donation of a conservation easement after Jan. 1, 2000).
6. *Id.*; H.B. 00-1348, codified in amended CRS § 39-22-522 (signed into law May 22, 2000; effective Aug. 2, 2000) (provides for transfer *and refund* of tax credits against Colorado income tax credit for donation of conservation easements by Colorado taxpayers on state properties); H.B. 01-1090, *supra*, note 1 (increases maximum amount of credit from $100,000 to $260,000 for conservation easements donated on or after Jan. 1, 2003); H.B. 02-1098, codified in amended CRS § 39-22-522 (signed into law May 24, 2002, effective Aug. 7, 2002) (amends statute to require conservation easements to comply with IRC § 170(h) as qualified conservation contributions to be eligible to qualify for the Colorado income tax credit).
7. *See* Jay, *supra*, note 2.
8. *Id.*
9. IRC § 170.
10. CRS §§ 38-30.5-100 *et seq.*; IRC § 170(b); Treas. Reg. § 1.170A-14 (1986); Treas. Reg. § 1.170A-8 (1986).
11. Treas. Reg. § 1.170A-1(c)(2) (1986); Treas. Reg. § 1.170A-13 (1986).
12. IRC § 2031(c); *see also* Jay, *supra*, note 2.
13. *Id.*; CRS § 39-22-522.
14. H.B. 99-1155, *supra*, note 5.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*; Treas. Reg. § 1.170A-13(c)(3) (1986).
20. H.B. 00-1348, *supra*, note 6.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. H.B. 99-1155, *supra*, note 5; H.B. 00-1348, *supra*, note 6.
26. *Id.*
27. *Conservation Tax Credit Exchange Brochure* (2002), available at Conservation Resource Center, LEAP111@aol.com; 2334 N. Broadway, Ste. A, Boulder, CO 80304, (303) 544-1044.
28. H.B. 99-1155, *supra*, note 5; H.B. 00-1348, *supra*, note 6.
29. H.B. 01-1090, *supra*, note 1.
30. Practitioners might reasonably query how to take refunds in $50,000 increments from $260,000; the legislation does not address that mathematical dilemma.
31. H.B. 01-1090, *supra*, note 1.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*; Treas. Reg. § 1.170A-13(c)(4) (1986).
36. H.B. 01-1090, *supra*, note 1.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. CRS § 39-22-103(5.6), (8), (9), (10), and (10.5).
46. CRS § 39-22-103(8)(a). An individual person does not qualify as a "resident individual," even if domiciled in Colorado, if he or she: (1) is absent from the state for 305 days of the tax year, is stationed outside of the country for active military duty, and forgoes filing a Colorado individual income tax return as a resident individual; or (2) is that person’s spouse and accompanies him or her for the absence and

elects not to file a tax return as a resident individual; or (3) is not any of the foregoing and elects treatment as a nonresident individual. CRS § 39-22-103(8)(b)(I)(A), (B), and (b)(II).
47. CRS § 39-22-103(5.6).
48. CRS § 39-22-103(9).
49. CRS § 39-22-103(7), (10), and (10.5).
50. "FYI—For Your Information, Gross Conservation Easement Credit, Income 39," CDOR (July 2002), available at http://www.taxcolorado. com.
51. H.B. 01-1090, *supra*, note 1.
52. Service Tech. Assist. Mem. (May 31, 2001).
53. *Id.*
54. H.B. 02-1098, *supra*, note 6; IRC § 170.
55. IRC § 170; Treas. Reg. § 1.170A-14 (1986).
56. *Id.*
57. *McLennan v. U.S.*, 24 Cl.Ct. 102, 106, n.8 (1991) ("Donation of property for the exclusive purpose of receiving a tax deduction does not vitiate the charitable nature of the contribution."). The relevant question in examining the subjective intent and motivation of a conservation easement donor will be "if a donor has any expectation of direct or indirect economic benefit from making the donation, aside from a tax deduction." *See* Knight and Dana, "Coordinated Conservation Easement Donations: Problems and a Proposed Solution (Part I)," *The Back Forty* 3 (March/April 1993). By extension, the same question might apply to donors motivated solely by an income tax credit.
58. *Id.*
59. *Supra*, note 50.
60. *Id.*
61. *Id.* This raises an interesting dilemma if an easement donor has transferred his or her credit to a buyer but the buyer fails to make use of the credit. In this instance, it is not clear whether the original easement donor (and seller of the credit) will be eligible for another credit after the transfer or whether he or she must wait until the buyer of the credit uses it. If the latter instance, there is no mechanism in place for determining how the seller would know when the buyer has made use of the credit.
62. *See* CDOR, "Proposed Tax Regulations for Gross Conservation Easement Income Tax Credit" (proposed Oct. 16, 2002), http://www.tax colorado.com.
63. *Id.* at Section 1)a, which states in relevant part: "Taxpayers qualified to claim the gross conservation easement credit (including transferees of these credits) are: . . . members of pass-through entities who receive the credits from such entity, regardless of whether such members are Colorado residents." However, in contrast, single-member LLCs and their members will not be eligible for a tax credit; the Proposed Regulations state: "[An LLC] with only one member will generally be disregarded for federal tax purposes . . . [per Treas. Reg. § 301.7701-3] . . . as well as state tax purposes. Therefore, the sole member does not qualify as a 'member of a pass-through entity' and does not qualify for the conservation easement credit unless the member is a Colorado resident." *Id.* at Section 1)c. Further, "part-year residents may claim the credit, but only if they make the donation while they are a Colorado resident." *Id.* at Section 1)d.
64. *See* IRC § 170(b).
65. *Id.* The practice of fragmenting real property and phasing the donation of easements over time is in contrast to the donor motivated purely by conservation value. Such a person donates one easement to cover his or her entire property and generates only one tax deduction and only one tax credit in return for his or her donation.
66. *Supra*, note 52.
67. In an attempt to assist partners in land conservation, the Colorado Coalition of Land Trusts (http://www.cclt.org) is proposing Standards of Conduct and Practices re: Colorado Income Tax Credits ("Standards") for land trusts and government entities responsible for accepting conservation easements. In an attempt to prohibit the appearance or occurrence of "abuse" of the credit law, the proposed Standards would encourage land trusts and government entities to: (1) make their usual determination of qualifying conservation values; and (2) help clarify the motivation of the taxpayer donating the easement (to determine if the donor is driven solely by the tax credit). E-mail and attachment of draft Standards to author from Bettina Ring, Executive Director of the Colorado Coalition of Land Trusts (Nov. 7, 2002).
68. *See* Knight and Dana, *supra*, note 57.
69. *Id.*

70. *See* note 30, *supra*, regarding the issue of $50,000 increments.