

STATE OF COLORADO

DEPARTMENT OF REVENUE

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John W. Hickenlooper
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Barbara J. Brohl
Executive Director

August 30, 2013

Dianne E. Ray, CPA
State Auditor
Colorado Office of the State Auditor
200 East 14th Avenue, 2nd Floor
Denver, CO 80203

Dear Ms. Ray:

In response to your request, we have prepared an updated status report regarding the implementation of audit recommendations contained in the Conservation Easement Tax Credit performance audit. The attached report provides a brief explanation of the actions taken by the Department of Revenue to implement each recommendation.

If you have any questions, please do not hesitate to contact me at 303 866 5610 or by email at barbara.brohl@state.co.us.

Sincerely,

A handwritten signature in blue ink that reads "Barbara J. Brohl".

Barbara J. Brohl
Executive Director

AUDIT RECOMMENDATION STATUS REPORT

AUDIT NAME: Conservation Easement Tax Credit Performance Audit

AUDIT NUMBER: 2171

DEPARTMENT/AGENCY/ENTITY: Department of Revenue (DOR), Division of Real Estate (DRE), and Conservation Easement Oversight Commission (CEOC)

DATE: September 2012

SUMMARY INFORMATION

Recommendation Number <i>(e.g., 1a, 1b, 2, etc.)</i>	Agency's Response <i>(i.e., agree, partially agree, disagree)</i>	Original Implementation Date <i>(as listed in the audit report)</i>	Implementation Status <i>(Implemented, Implemented and Ongoing, Partially Implemented, Not Implemented, or No Longer Applicable)</i> Please refer to the attached sheet for definitions of each implementation status option.	Revised Implementation Date <i>(Complete only if agency is revising the original implementation date.)</i>
1a (DOR)	Agree	March 2013	Implemented	n/a
1b (DOR)	Agree	March 2013	Implemented	n/a
1c (DOR)	Agree	March 2013	Implemented	n/a
2a (DOR)	Agree	July 2013	Implemented	n/a
2b (DOR)	Agree	July 2013	Implemented	n/a
2c (DOR)	Agree	July 2013	Implemented	n/a
3a (DOR)	Agree	December 2013	Partially Implemented	n/a
3b (DOR)	Agree	December 2013	Partially Implemented	n/a
3c (DOR)	Agree	December 2013	Partially Implemented	n/a
4 (DOR)	Agree	June 2012 and Ongoing	Implemented and Ongoing	n/a
4 (DRE)	Agree	June 2012 and Ongoing	Implemented and Ongoing	n/a
4 (CEOC)	Agree	June 2012 and Ongoing	Implemented and Ongoing	n/a
5 (DOR)	Agree	December 2012	Implemented and Ongoing	n/a

Recommendation Number (e.g., 1a, 1b, 2, etc.)	Agency's Response (i.e., agree, partially agree, disagree)	Original Implementation Date (as listed in the audit report)	Implementation Status (Implemented, Implemented and Ongoing, Partially Implemented, Not Implemented, or No Longer Applicable) Please refer to the attached sheet for definitions of each implementation status option.	Revised Implementation Date (Complete only if agency is revising the original implementation date.)
6 (DRE)	Agree	March 2013	Implemented	n/a
6 (CEOC)	Agree	March 2013	Implemented and Ongoing	n/a
7a (DRE)	Agree	January 2013	Implemented and Ongoing	n/a
7b (DRE)	Agree	January 2013	Implemented	n/a
7c (DRE)	Agree	January 2013	Implemented	n/a
7d (DRE)	Agree	July 2013	No Longer Applicable	n/a
8 (DRE)	Agree	March 2013	Implemented	n/a
9 (DRE)	Agree	January 2013 and Ongoing	Implemented and Ongoing	n/a
10a (DOR)	Agree	July 2013	Implemented	n/a
10a (DRE)	Agree	July 2013	Implemented	n/a
10b (DOR)	Agree	July 2013	Implemented	n/a
10b (DRE)	Agree	July 2013	Implemented	n/a
11a (DOR)	Agree	July 2013	Implemented	n/a
11a (DRE)	Agree	July 2013	Implemented	n/a
11a (CEOC)	Agree	July 2013	Implemented	n/a
11b (DOR)	Agree	July 2013	Implemented	n/a
11b (DRE)	Agree	July 2013	Implemented	n/a
11b (CEOC)	Agree	July 2013	Implemented	n/a
11c (DOR)	Agree	July 2013	Implemented	n/a
11c (DRE)	Agree	July 2013	Implemented	n/a
11c (CEOC)	Agree	July 2013	Implemented	n/a

Recommendation Number <i>(e.g., 1a, 1b, 2, etc.)</i>	Agency's Response <i>(i.e., agree, partially agree, disagree)</i>	Original Implementation Date <i>(as listed in the audit report)</i>	Implementation Status <i>(Implemented, Implemented and Ongoing, Partially Implemented, Not Implemented, or No Longer Applicable)</i> Please refer to the attached sheet for definitions of each implementation status option.	Revised Implementation Date <i>(Complete only if agency is revising the original implementation date.)</i>
11d (DOR)	Agree	July 2013	Implemented	n/a
11d (DRE)	Agree	July 2013	Implemented	n/a
11d (CEOC)	Agree	July 2013	Implemented	n/a
12a (DOR)	Agree	July 2013	Implemented	n/a
12b (DOR)	Agree	July 2013	Implemented	n/a
12c (DOR)	Agree	July 2013	Implemented	n/a

DETAIL OF IMPLEMENTATION STATUS

Recommendation #: 1

Agency Addressed: Department of Revenue

Recommendation Text in Audit Report:

The Department of Revenue (DOR) should strengthen its review of conservation easement tax credit claims to ensure coverage of key requirements and consideration of relevant risk factors by:

- a. Including a basic review of the reported conservation purpose as part of a Level 1 review, and developing risk factors or other criteria that would require referral of the claim to the Conservation Easement Oversight Commission (CEOC) for a more complete assessment of the easement's conservation purpose as part of a Level 2 review.
- b. Expanding the current list of risk factors to include phased donations and donors with prior disallowed credit claims.
- c. Evaluating and updating the list of risk factors on at least an annual basis. DOR should consult with the Division of Real Estate (DRE) and the CEOC during this process.

Agency's Response *(i.e., Agree, Partially Agree, or Disagree):*

Agree

Agency's Written Response in Audit Report:

- a. DOR will include a basic review of the reported conservation purpose in its Level 1 review of conservation easement tax credit claims. In addition, as part of its on-going discussions with the Division of Real Estate (DRE) and the CEOC about improving the consultation process, DOR will develop risk factors to be considered as part of the Level 2 review of conservation easement tax credits which will include provisions for when the conservation purpose of an easement should be reviewed by the CEOC.
- b. DOR will expand its current list of risk factors to explicitly include all phased donations and prior disallowed credit claims. In addition, as part of its ongoing discussions with DRE and the CEOC about improving the consultation process, DOR will ask for input about its current list of risk factors which are used during the Level 1 and Level 2 reviews in order to determine more specific risk factors related to phased donations which may need to be addressed.
- c. DOR currently updates its list of risk factors as it learns of new risks and will continue to do so. In addition, DOR will review its list of risk factors with DRE and the CEOC at the beginning of each fiscal year.

Current Implementation Status of Recommendation (i.e., Implemented, Implemented and Ongoing, Partially Implemented, Not Implemented, or No Longer Applicable):

Implemented and Ongoing

Agency's Comments on Implementation Status of Recommendation:

- a. The Department updated its Level 1 review checklist to include a review of the conservation purpose and the Level 2 review checklist to include mandatory referral of appraisal and/or deeds to the CEOC if any issues remain after the second review. On February 25, 2013, the Department reviewed and discussed the updated checklists and risk factors with DRE and CEOC. Neither agency suggested expansion of the list of risk factors or offered any needed updating. Instead, the CEOC suggested that the Department remove several of its existing risk factors, which the Department has declined to do.
- b. The Department updated its Level 1 review checklist to include phased donations or donors with prior disallowed credits as risk factors requiring a Level 2 review. On February 25, 2013, the Department reviewed and discussed the updated checklists and risk factors with DRE and CEOC. Neither agency suggested expansion of the list of risk factors or offered any needed updating. Instead, the CEOC suggested that the Department remove several of its existing risk factors, which the Department has declined to do.
- c. DOR currently updates its list of risk factors as it learns of new risks and will continue to do so. In addition, Department will review its list of risk factors with DRE and the CEOC at the beginning of each fiscal year.

Recommendation #: 2

Agency Addressed: Department of Revenue

Original Recommendation in Audit Report:

The Department of Revenue (DOR) should ensure that its review of conservation easement tax credits claims is consistently applied and that the resulting decisions to allow or disallow claims are appropriate and substantiated by:

- a. Developing and utilizing a standard work program or review tool to guide and document tax examiners' review of conservation easement tax credit claims.
- b. Developing more complete and detailed written policies and procedures for reviewing conservation easement tax credit claims, including how reviews should be documented.
- c. Instituting a quality review process whereby a supervisor and/or quality control staff routinely reviews a sample of conservation easement tax credit claim reviews completed by tax examiners. Supervisors and quality control staff performing the reviews should receive training to maintain at least a basic level of competency with the conservation easement tax credit and related issues.

Agency's Response (*i.e., agree, partially agree, disagree*):

Agree

Agency's Written Response in Audit Report:

- a. DOR has further developed its checklists for employees to use as part of the Level 1 and Level 2 reviews of conservation easement tax credits and is currently updating these checklists to ensure that Recommendation No. 1 of the State Auditor's report be included.
- b. DOR will develop more complete and detailed written policies and procedures for reviewing conservation easement tax credit claims which will reference the checklists and their use as well as any additional documentation requirements.
- c. DOR currently sends cases with which it has concerns to the Division of Real Estate and the Conservation Easement Oversight Commission as part of its quality review process and will continue to do so. In addition, DOR will review its current staffing assignment of tax examiners and identify changes to be made which will result in routine supervisory reviews of tax credits which have been both disallowed and not disallowed.

Current Implementation Status of Recommendation (i.e., Implemented, Implemented and Ongoing, Partially Implemented, Not Implemented, or No Longer Applicable):

Implemented

Agency's Comments on Implementation Status of Recommendation:

- a. The Department of Revenue developed and revised checklists for employees to use as part of the Level 1 and Level 2 reviews of conservation easement tax credits. These checklists include recommendations made by the State Auditor's report.
- b. The Department of Revenue developed more complete and detailed written policies and procedures for reviewing conservation easement tax credit claims which reference the checklists and their use.
- c. The Department of Revenue reassigned tax examiners reviewing conservation easement tax credits from Taxpayer Services Division to the Gross Conservation Easement Program within the Conferee Section to ensure that the supervision of the tax examiners is by personnel who work with and have significant experience in gross conservation easement matters. The updated written policies and procedures include changes to the review process and include routine supervisory reviews of tax credits which have been disallowed or not disallowed.

Recommendation #: 3

Agency Addressed: Department of Revenue

Original Recommendation in Audit Report:

The Department of Revenue (DOR) should ensure that its electronic data and information management systems effectively support the administration of the conservation easement tax credit by:

- a. Utilizing a relational database to manage data at the donation and taxpayer levels in a manner that captures the complexity of the tax credit claims and uses over time. As part of this process, DOR should migrate the existing TPS data to a relational database.
- b. Capturing data from Form DR1305 for all conservation easement tax credit claims in the year in which the claim is made, regardless of when the use of the credit occurs. Tax examiners should enter data on uses of the tax credit as they perform their reviews.
- c. Instituting appropriate data entry controls to help prevent data inaccuracies, and routine cleanup procedures to help identify and correct any data inaccuracies that do occur.

Agency's Response (*i.e., agree, partially agree, disagree*):

Agree

Agency's Written Response in Audit Report:

- a. DOR will determine the options available with the primary focus being on incorporating the TPS database into our existing tax system, GenTax. Once all feasible options are determined, they will be reviewed and the most cost-effective option will be implemented.
- b. DOR will enter information from Form DR1305 into the applicable database as identified in subpart (a) of this recommendation at the time returns are received from taxpayers, which will ensure data are captured more quickly and will eliminate the need for tax examiners to perform data-entry functions to any separate database.
- c. Because DOR will change how and when data are entered into the applicable database as identified in subparts (a) and (b) of this recommendation, existing data-entry controls instituted by its data entry unit within the Central Department Operations Division will help prevent data inaccuracies. In addition, DOR will review data entered on a quarterly basis as reports are generated from the applicable database as identified in subpart (a) of this recommendation to be used in preparing statutorily required reports.

Current Implementation Status of Recommendation (i.e., Implemented, Implemented and Ongoing, Partially Implemented, Not Implemented, or No Longer Applicable):

Partially Implemented

Agency's Comments on Implementation Status of Recommendation:

- a. The Department of Revenue is actively working to incorporate the Taxpayer Service database into GenTax. Implementation is targeted for December 2013.
- b. The Department of Revenue is actively working to include Form CR1305 as part of the data entry and imaging procedures in GenTax. Implementation is targeted for December 2013.
- c. The Department of Revenue is actively working on data entry controls as part of its projects of incorporating the Taxpayer Service database into GenTax and including Form DR1305 as part of the data entry procedures in GenTax. Implementation is targeted for December 2013.

Recommendation #: 4

Agencies Addressed: Department of Revenue, Division of Real Estate, and Conservation Easement Oversight Committee

Recommendation Text in Audit Report:

The Department of Revenue (DOR), the Division of Real Estate (DRE), and the Conservation Easement Oversight Commission (CEOC) should improve communication efforts and continue to build a common understanding about the purpose and goals of the consultation process. This should include using the consultation process to hold routine discussions about the general issues and trends being observed with conservation easement transactions associated with tax credit claims.

Agencies' Responses (i.e., Agree, Partially Agree, or Disagree):

DOR – Agree
DRE – Agree
CEOC – Agree

Agencies' Written Responses in Audit Report:

- DOR DOR is currently working on improving its communication with DRE and the CEOC. DOR, DRE, and the CEOC will continue this effort by changing and formalizing the consultation process to be more useful to DOR and to better utilize the expertise of DRE and the CEOC in determining whether taxpayers have complied with the requirements for claiming a conservation easement tax credit.
- DRE DRE has worked over the past two years to improve communication, understanding, and cooperation between DOR and the CEOC. These efforts have proven fruitful and will continue through informal discussions between staff and at CEOC meetings. Specifically, DRE will work with DOR staff to identify a process in which the two agencies will routinely discuss issues. Issues will then be brought to the CEOC for input at regularly scheduled meetings. DRE will work with DOR and the CEOC to increase the effectiveness and efficiency of the consultation process.
- CEOC The CEOC is committed to continuing to work to improve communication with DOR and DRE to build a common understanding about the purpose and goals of the consultation process. Discussions about conservation issues and trends should include concerns identified by the CEOC, including the cost to the State of legal expenses and staff time pursuing tax credit claims that the CEOC believes are appropriate. The CEOC has recommended disallowance of more than 600 conservation easement tax credits and strongly supports disallowances where parties have abused the law. However, the CEOC strongly believes that sound, legitimate conservation easement tax credit claims are being disallowed based upon strict and perhaps unrealistic standards. Finding a way to

address this concern as the consultation process moves forward will be an important part of the CEOC's ongoing communication efforts with DOR and DRE.

Current Implementation Status of Recommendation (i.e., Implemented, Implemented and Ongoing, Partially Implemented, Not Implemented, or No Longer Applicable):

DOR – Implemented and Ongoing
DRE – Implemented and Ongoing
CEOC – Implemented and Ongoing

Agencies' Comments on Implementation Status of Recommendation:

- DOR DOR is currently working on improving its communication with DRE and the CEOC. DOR, DRE, and the CEOC will continue this effort by changing and formalizing the consultation process to be more useful to DOR and to better utilize the expertise of DRE and the CEOC in determining whether taxpayers have complied with the requirements for claiming a conservation easement tax credit.
- DRE DRE worked with the DOR and CEOC to make the consultation process more productive. Specifically we have developed a process in which the DOR provides the DRE and CEOC with specific questions regarding each transaction. The DRE and CEOC provide verbal consultation and answer questions at the regularly scheduled consultation meetings as well as provide written reports responding to the written questions provided by DOR. The DRE, DOR and CEOC regularly discuss the consultation process at the quarterly Commission meetings and continually work to improve the process.
- CEOC The CEOC worked with the DOR and the CEOC to make the consultation process more productive. Specifically we have developed a process in which the DOR provides the DRE and CEOC with specific questions regarding each transaction. The DRE and CEOC provide verbal consultation and answer questions at the regularly scheduled consultation meetings as well as provide written reports responding the specific written questions posed by DOR. The DRE, DOR and CEOC regularly discuss the consultation process at the quarterly Commission meetings and continually work to improve the process.

Recommendation #: 5

Agency Addressed: Department of Revenue

Original Recommendation in Audit Report:

The Department of Revenue (DOR) should provide the Conservation Easement Oversight Commission (CEOC) with more information, such as areas of concern or specific questions that need to be addressed, when referring individual conservation easement tax credit claims to the CEOC for consultation. DOR should also communicate its final decisions to allow or disallow tax credit claims that are referred for consultation.

Agency's Response (*i.e., agree, partially agree, disagree*):

Agree

Agency's Written Response in Audit Report:

DOR will provide more information to the Division of Real Estate (DRE) and the CEOC regarding DOR's specific questions and concerns about appraisals and/or deeds submitted for consultation. DOR will also provide information on a quarterly basis to DRE and the CEOC about DOR's actions on cases previously submitted for consultation.

Current Implementation Status of Recommendation (i.e., Implemented, Implemented and Ongoing, Partially Implemented, Not Implemented, or No Longer Applicable):

Implemented and Ongoing

Agency's Comments on Implementation Status of Recommendation:

On November 5, 2012, the Department of Revenue provided files to the DRE and CEOC for the cases to be reviewed at the December 3, 2012, CEOC meeting. Included with the files was a list of general questions for all files as well as a list of specific questions for each file transmitted. At the December meeting the Department provided detailed information about the department's action and current status of all cases on which recommendations were made by the DRE and CEOC. The Department will continue this process for all future meetings.

Recommendation #: 6

Agencies Addressed: Division of Real Estate and Conservation Easement Oversight Commission

Original Recommendation in Audit Report:

The Division of Real Estate (DRE) and the Conservation Easement Oversight Commission (CEOC) should revise the CEOC's written orientation manual to better address the CEOC's broader responsibility to the general taxpayer when defining "the public interest." The manual should explicitly recognize that the consultation process should further the State's ability to determine whether the landowner has complied with the statutory and regulatory requirements for claiming the conservation easement tax credit.

Agencies' Responses (*i.e., agree, partially agree, disagree*):

DRE – Agree

CEOC – Agree

Agencies' Written Responses in Audit Report:

DRE DRE will work with the CEOC to review and revise the written orientation manual to further define the responsibility that CEOC members have to the general taxpayers as part of the duty to protect the public interest. Revisions will include a discussion of the role the CEOC plays in the consultation process and how the CEOC will further the State's ability to determine compliance with statutory and regulatory requirements. DRE staff will prepare recommended changes for discussion at the December 3, 2012 CEOC meeting. Additionally, DRE staff and the CEOC's legal counsel will review the responsibilities and roles of CEOC members at the yearly CEOC retreat taking place in the first quarter of 2013.

CEOC The CEOC will revise the written orientation manual, which was written prior to consultation with DOR, to address the CEOC's role in the consultation process. The CEOC was created by statute to advise DRE and DOR on conservation easement transactions. When advising these agencies the CEOC tries to protect the financial interest of all taxpayers, including those who donate conservation easements. A designated seat on the CEOC for a landowner/donor supports the CEOC's position that part of its responsibility is to consider the landowner perspective. The CEOC represents various stakeholders with significant expertise on conservation easement transactions, and its members believe it is appropriate for the CEOC, in its advisory capacity, to question the basis for DOR's and DRE's decisions and to ensure that all perspectives are considered. The CEOC will continue to use its diverse expertise and the various member perspectives (e.g., state agencies, a local government, land trusts, and a landowner) to advise both the DOR and DRE on all aspects of conservation easement transactions associated with tax credit claims.

Current Implementation Status of Recommendation (i.e., Implemented, Implemented and Ongoing, Partially Implemented, Not Implemented, or No Longer Applicable):

DRE – Implemented

CEOC – Implemented

Agencies' Comments on Implementation Status of Recommendation:

DRE The CEOC Orientation Manual was revised to more explicitly address the responsibility each commissioner has in protecting the public's interest and upholding Colorado law. A copy of the manual is available upon request. Commissioners' roles and responsibilities were further discussed at the CEOC's 2013 annual retreat.

CEOC The CEOC Orientation Manual was revised to more explicitly address the responsibility each commissioner has in protecting the public's interest and upholding Colorado law. A copy of the manual is available upon request. Commissioners' roles and responsibilities were further discussed at the CEOC's 2013 annual retreat.

Recommendation #: 7

Agency Addressed: Division of Real Estate

Recommendation Text in Audit Report:

The Division of Real Estate (DRE) should ensure that the conservation easement appraisal review process is effective at identifying and referring problematic appraisals for investigation before a tax credit is claimed by:

- a. Performing a desk review of, at a minimum, all conservation easement appraisals for which a tax credit will be claimed.
- b. Developing standard operating procedures that outline the general parameters of the desk review, including the risk factors warranting a desk review and the required and/or significant attributes that should be examined on every desk review.
- c. Developing and utilizing a standard review template, or other similar tool, to ensure the consistency and completeness of the desk review and to document the significant judgments made, conclusions reached, and subsequent actions taken.
- d. Working with the General Assembly to further clarify in statute the intended purpose and scope of the conservation easement appraisal review requirement.

Agency's Response (*i.e., Agree, Partially Agree, or Disagree*):

Agree

Agency's Written Response in Audit Report:

- a. DRE staff will identify and review all appraisals used to substantiate a tax credit claim. DRE's continued goal is to complete a review of conservation easement appraisals used as substantiation for tax credit claims within the calendar year the appraisal is received by DRE. The ability to accomplish this goal is complicated by limited staff resources, fiscal constraints, difficulties predicting the number of appraisals that must be reviewed, and the additional workload resulting from the consultation process. Despite these complications, DRE has reviewed 95 percent of all appraisals for tax-credit-generating easements in 2011 and has since completed reviews of the remaining four appraisals. DRE will ensure resources are available to effectively administer reviews of all conservation easement appraisals substantiating conservation easement tax credit claims.

- b. DRE will formalize risk factors used to prioritize reviews of conservation easement appraisals. Staff will also develop a procedure that identifies attributes of the appraisal that must be reviewed in every case as well as unique circumstances that require further review. The process will address situations where additional information should be sought as well as the process for referring problematic appraisals for investigation.
- c. DRE will create a new review template allowing for consistent documentation and reporting of review findings. The template will be used in all reviews to ensure the consistency and completeness of reviews and to document conclusions and subsequent actions taken by DRE. It will also allow flexibility in cases where staff reviewers identify unique issues that require additional review or information.
- d. DRE will work with the General Assembly as appropriate to clarify the desired scope and purpose of conservation easement appraisal reviews. Any additional level of review beyond what is recommended in this audit report likely will require the allocation of additional resources. DRE will also address the scope and purpose of appraisal reviews as part of our report to the General Assembly requested in Recommendation No. 11.

Current Implementation Status of Recommendation (i.e., Implemented, Implemented and Ongoing, Partially Implemented, Not Implemented, or No Longer Applicable):

Implemented and Ongoing

Agency's Comments on Implementation Status of Recommendation:

Starting in 2013 the DRE began using a new conservation easement appraisal review template. It ensures all key elements of the appraisal are reviewed and the results are properly documented. While there is no statutory deadline for when the appraisal reviews must be completed, the DRE is committed to reviewing all tax-credit-generating conservation easement appraisals by December 31, 2013. Effective January 1, 2014, the appraisal reviews will become part of the new conservation easement tax credit approval process. The appraisal reviews are part of the 120 day statutory deadline that is imposed upon the DRE. The scope of appraisal reviews and risk factors used to determine the priority of appraisal reviews were defined in the conservation easement appraisal review policy adopted in December 2012. Many of the changes to the current appraisal review process will be utilized when the new conservation easement tax credit approval process is implemented. SB13-221 repealed the ambiguous appraisal review requirements and provided clear guidelines for the scope and purpose of conservation easement appraisal reviews conducted during the new conservation easement tax credit approval process.

Recommendation #: 8

Agency Addressed: Division of Real Estate

Recommendation Text in Audit Report:

The Division of Real Estate (DRE) should strengthen the conservation easement holder certification process by formally establishing “conditional certification” in state rule. This should include specifying the appropriate purpose and use of conditional certification, what evaluation criteria would result in conditional certification versus full certification or denial of certification, and any other administrative requirements that are necessary to implement conditional certification.

Agency’s Response (*i.e., Agree, Partially Agree, or Disagree*):

Agree

Agency’s Written Response in Audit Report:

Conditional certification is a useful tool that DRE will work towards formalizing through rule. It provides an additional safeguard ensuring that organizations continue to meet the minimum requirements for certification. DRE will specify criteria used to determine which organizations qualify for conditional certification and any additional requirements they must adhere to. The formalized rule will allow DRE to apply requirements consistently but maintain the flexibility necessary to address the specific concerns identified. Staff drafted a conditional certification rule prior to the initiation of the audit with the intention of formalizing conditional certification. DRE will move forward with adoption of a conditional certification rule in the first quarter of 2013.

Current Implementation Status of Recommendation (i.e., Implemented, Implemented and Ongoing, Partially Implemented, Not Implemented, or No Longer Applicable):

Implemented

Agency’s Comments on Implementation Status of Recommendation:

DRE adopted Rule A-6 Conditional Certification in March of 2013. The rule allows for conditional certification when the conservation easement holder does not clearly demonstrate compliance with certification requirements. Conditional certification may include but is not limited to requiring the co-holding of conservation easements, audits of project documentation and pre-approval of new projects. The DRE does not anticipate that this tool will be widely used, but the new conservation easement tax credit approval process will allow the DRE with a means to track compliance with the terms of the conditional certifications.

Recommendation #: 9

Agency Addressed: Division of Real Estate

Recommendation Text in Audit Report:

The Division of Real Estate (DRE) should strengthen the certification process to ensure that conservation easement holders continue to meet the certification requirements on an ongoing basis. At a minimum, DRE should periodically conduct an in-depth review of documentation for conservation easements that holders have accepted since their initial certification or most recent certification renewal.

Agency's Response (*i.e., Agree, Partially Agree, or Disagree*):

Agree

Agency's Written Response in Audit Report:

DRE staff will implement a schedule for reviewing conservation easement project documentation as a requirement of certification. The process will ensure projects from all certified conservation easement holders are reviewed on a periodic basis. DRE will identify risk factors that will trigger automatic project reviews as well as conduct random reviews. Staff review of project documentation will be similar to that conducted during the initial certification process. Project documentation reviews will occur throughout the year.

Current Implementation Status of Recommendation (i.e., Implemented, Implemented and Ongoing, Partially Implemented, Not Implemented, or No Longer Applicable):

Implemented and Ongoing

Agency's Comments on Implementation Status of Recommendation:

In December 2012 the DRE adopted an internal policy requiring every certified conservation easement holder be subject to an in-depth audit once every three years. The audits are to occur as part of the certification renewal process. The policy calls for a review of recent conservation easement transactions, stewardship practices, and internal policies or procedures. As a result of SB13-221 the DRE revised the policy in July of 2013. The revised policy calls for an audit of the holder's stewardship practices and internal policies or procedures. The review of conservation easement transactions was removed from the policy because it is duplicative of the review each transaction will undergo in the tax credit approval process.

Recommendation #: 10

Agencies Addressed: Department of Revenue and Division of Real Estate

Recommendation Text in Audit Report:

The Division of Real Estate (DRE) and the Department of Revenue (DOR) should evaluate options for protecting the State's investment of public resources in tax-credit-generating conservation easements when the conservation easement holder is no longer certified. DRE and DOR should report back to the Legislative Audit Committee and the House and Senate Finance Committees by July 1, 2013, on viable options and pursue statutory and/or regulatory change, as appropriate. At a minimum, options that should be considered include:

- a. Strengthening DRE's ability to investigate complaints against conservation easement holders that hold tax-credit-generating conservation easements, regardless of whether or not the holder is certified.
- b. Utilizing assignment clauses in the deeds for tax-credit-generating conservation easements that reserve the State's right to require the transfer of the easement to another certified conservation easement holder when the original holder ceases to exist; is no longer certified; or is unwilling, unable, or unqualified to enforce the terms and provisions of the easement.

Agencies' Responses (i.e., Agree, Partially Agree, or Disagree):

DOR – Agree

DRE – Agree

Agencies' Written Response in Audit Report:

- a. DOR DOR will meet with DRE to discuss options for strengthening DRE's ability to investigate complaints against conservation easement holders and, in conjunction with DRE, will report back to the General Assembly.

DRE DRE will explore options allowing for the investigation and enforcement of regulatory or statutory requirements for non-certified conservation easement holders. Regulatory programs do not typically have jurisdiction over entities that are not required to be certified or licensed. Creating a framework allowing DRE to investigate and enforce regulations for non-certified conservation easement holders will require statutory changes providing the required jurisdiction and resources. DRE will explore statutory and regulatory options and report back to the General Assembly as requested.
- b. DOR DOR will meet with DRE to discuss options for addressing the issues related to conservation easement holders' failures or refusals to enforce the terms and provisions of a conservation easement and, in conjunction with DRE, will report back to the

General Assembly.

DRE DRE has met with staff at the Great Outdoors Colorado (GOCO) to discuss the assignment clause required for conservation easements utilizing GOCO funds. DRE staff will continue to investigate appropriate conservation easement language and other options to ensure conservation easements are appropriately managed and enforced in perpetuity. DRE will work with DOR to identify practical options for reserving the State's right to require the transfer of tax credit generating easements to another holder. DRE is committed to ensuring the long-term management of conservation easements involving the state tax credit and will work to identify and report back to the General Assembly on a viable process that further protects the State's investment of public resources in tax-credit-generating conservation easements.

Current Implementation Status of Recommendation (i.e., Implemented, Implemented and Ongoing, Partially Implemented, Not Implemented, or No Longer Applicable):

DOR – Implemented

DRE – Implemented

Agencies' Comments on Implementation Status of Recommendation:

DOR The Division of Real Estate and the Department of Revenue discussed options for protecting the State's investment of public resources in tax credit-generating conservation easements when the conservation easement holder is no longer certified. A written report was prepared and submitted to members of the Legislative Audit Committee and the House and Senate Finance Committees on July 1, 2013, on viable options.

DRE DRE convened a taskforce of industry representatives to seek input on the report provided to the General Assembly on July 1, 2013. The report outlines options policy makers have to further ensure that the public investment in tax-credit-generating conservation easements is appropriately protected. Beyond the implementation of new regulatory requirements the taskforce identified numerous ways the industry is improving its ability to ensure the long-term protection of conserved land. The state and certified conservation easement holders have a common interest in seeing that the protection of tax-credit-generating conservation easements is permanent. DRE is committed to working with the legislature and industry as necessary to implement additional protections for tax-credit-generating conservation easements.

Recommendation #: 11

Agencies Addressed: Department of Revenue, Division of Real Estate, and Conservation Easement Oversight Commission

Recommendation Text in Audit Report:

The Department of Revenue (DOR), the Division of Real Estate (DRE), and the Conservation Easement Oversight Commission (CEOC) should work together to design a pre-approval process for reviewing and approving conservation easement tax credit claims. These agencies should report to the Legislative Audit Committee and the House and Senate Finance Committees by July 1, 2013, on a proposed pre-approval process, including any statutory and regulatory changes that are necessary for implementation. At a minimum, the proposed pre-approval process should ensure that:

- a. The State has reasonable assurances that conservation easement tax credits being claimed by taxpayers are valid and comply with all statutory and regulatory requirements.
- b. Conservation easement tax credit claims are approved or denied separately from and prior to any uses of the tax credit. Avenues for appealing decisions made during the pre-approval process should be clearly established and communicated to the taxpayer.
- c. All essential elements related to conservation easement tax credit claims are reviewed and approved by those with the most appropriate and relevant expertise.
- d. The review and approval of tax credit claims is timely.

Agencies' Responses (i.e., Agree, Partially Agree, or Disagree):

DOR – Agree
DRE – Agree
CEOC – Agree

Agencies' Written Responses in Audit Report:

DOR DOR will meet with DRE and the CEOC to discuss and provide options for designing a pre-approval process for reviewing and approving conservation tax credits and report back to the General Assembly. The discussion will include the issues raised in the State Auditor's report and in Recommendation No. 11 subparts (a) through (d).

- DRE DRE will work with DOR and the CEOC to explore processes by which the State would approve conservation easement tax credit claims prior to the tax credit being used. There are likely many viable options for implementing an approval process that meets the minimum requirements of this recommendation. DRE will work to ensure proposals are aligned with the expertise of DRE, DOR, and the CEOC. A report outlining the identified options for a pre-approval process will be provided to General Assembly as requested.
- CEOC The CEOC is committed to working with DRE and DOR to develop a process that provides certainty to landowners who do qualified transactions with licensed appraisers and certified conservation easement holders, and which provides reasonable assurances to the State that the credits claimed comply with statutory and regulatory requirements. It is the consensus of the CEOC's members that, while HB 08-1353 eliminated the occurrence of fraudulent tax credit claims and unqualified easement holders, the current process fails to provide a clear path for legitimate conservation easement tax credit claims to move forward. It is the CEOC's opinion that, as stated in the audit, the review and decision-making processes should be reassigned to those agencies with appropriate expertise. The CEOC members believe it is necessary for all parties to fully participate in the design of a process that accomplishes these goals and that the process must provide for a binding decision-making process not subject to administrative discretion.

Current Implementation Status of Recommendation (i.e., Implemented, Implemented and Ongoing, Partially Implemented, Not Implemented, or No Longer Applicable):

- DOR – Implemented
DRE – Implemented
CEOC – Implemented

Agencies' Comments on Implementation Status of Recommendation:

- DOR The Legislative Audit Committee sponsored SB13-221, which is legislation that was the result of numerous meetings between representatives of the Department, DRE, the CEOC, and Colorado Coalition of Land Trusts. This legislation is a pre-approval process for reviewing and approving conservation easement tax credit claims prior to their use on income tax returns. The legislation provides authority to the agency with the appropriate and relevant expertise to review the various elements of the conservation easement tax credit.

The pre-certification legislation sponsored by the Legislative Audit Committee passed through the General Assembly. The legislation provides the following: reasonable assurances that conservation easement tax credits being claimed by taxpayers are valid and comply with all statutory and regulatory requirements; conservation easement tax credit claims are approved or denied separately from and prior to any uses of the tax credit; avenues for appealing decisions made during the pre-approval process

should be clearly established and communicated to the taxpayer; all essential elements related to conservation easement tax credit claims are reviewed and approved by those with the most appropriate and relevant expertise; the review and approval of tax credit claims is timely.

DRE DRE worked with the LAC, DOR and CEOC to create a conservation easement tax credit approval process passed into law during the 2013 legislative session. The new approval process is required for donations made on or after January 1, 2014. The DRE is working this fall to staff the program and implement the legislation. All necessary staffing changes, rules, policies and procedures are on schedule to be in place by January 1, 2014.

CEOC CEOC worked with the LAC, DRE and DOR to create a tax credit approval process passed into law during the 2013 legislative session. The new approval process is required for donations made on or after January 1, 2014. The CEOC is working with DRE this fall to implement the legislation.

Recommendation #: 12

Agency Addressed: Department of Revenue

Original Recommendation in Audit Report:

The Department of Revenue (DOR) should help ensure the State's ability to measure the public benefits of the conservation easement tax credit by:

- a. Improving taxpayer forms to capture data in a format that facilitates aggregate analysis and reporting on the specific conservation purposes and land attributes that are being protected by conservation easements.
- b. Ensuring that taxpayers donating tax-credit-generating conservation easements submit Form DR1304.
- c. Eliminating unnecessary or duplicative data collection forms and consolidating public reports when possible.

Agency's Response (*i.e., agree, partially agree, disagree*):

Agree

Agency's Written Response in Audit Report:

- a. DOR will help ensure the State's ability to measure the public benefits of the conservation easement tax credit by improving required forms used to capture data about conservation easements and the associated tax credits.
- b. DOR will review its procedures in obtaining Form DR1304 from taxpayers and make changes to ensure the form is submitted.
- c. DOR will review the forms associated with conservation easement tax credits and eliminate any unnecessary or duplicative data requests that are not statutorily required and consider options for consolidating public reports. In addition, DOR will review its publication of information on its website to ensure it is easily accessible.

Current Implementation Status of Recommendation (i.e., Implemented, Implemented and Ongoing, Partially Implemented, Not Implemented, or No Longer Applicable):

Implemented

Agency's Comments on Implementation Status of Recommendation:

- a. The Department of Revenue revised its forms used to capture data about conservation easements and the associated tax credits. The forms will be available for use with the 2013 tax year.
- b. The Department of Revenue revised its forms used to capture data about conservation easements and the associated tax credits. The forms will be available for use with the 2013 tax year filings. In addition, the DR1304 is now part of the checklists used by employees in reviewing returns and taxpayers will be contacted if the form is not submitted with the return.
- c. The Department of Revenue revised its forms used to capture data about conservation easements and the associated tax credits. The form revisions eliminated unnecessary or duplicative data requests and will be available for use with the 2013 tax year filings. As a result of changed legislation the reporting requirements will be eliminated as of January 1, 2014. In addition, the Department updated its website in July 2013 to improve the visibility of the public information.



Dora
Department of Regulatory Agencies

Division of Real Estate
Marcia Waters
Director

John W. Hickenlooper
Governor

August 26, 2013

Barbara J. Kelley
Executive
Director

Dianne E. Ray, CPA
State Auditor
Colorado Office of the State Auditor
200 East 14th Avenue, 2nd Floor
Denver, CO 80203

Dear Ms. Ray:

In response to your request, we have prepared an updated status report regarding the implementation of audit recommendations contained in the Conservation Easement Tax Credit performance audit. The attached report provides a brief explanation of the actions taken by the Division of Real Estate and the Conservation Easement Oversight Commission to implement each recommendation.

If you have any questions, please do not hesitate to contact me at 303-894-2422 or by email at marcia.waters@state.co.us.

Sincerely,

Marcia Waters
Division Director





Conservation Easement Tax Credit Performance Audit – September 2012

Division of Real Estate and Department of Revenue Response to Recommendation No. 10

Recommendation No. 10:

The Division of Real Estate (DRE) and the Department of Revenue (DOR) should evaluate options for protecting the State’s investment of public resources in tax credit-generating conservation easements when the conservation easement holder is no longer certified. DRE and DOR should report back to the Legislative Audit Committee and the House and Senate Finance Committees by July 1, 2013, on viable options and pursue statutory and/or regulatory change, as appropriate. At a minimum, options that should be considered include:

- a. Strengthening DRE’s ability to investigate complaints against conservation easement holders that hold tax-credit-generating conservation easements, regardless of whether or not the holder is certified.
- b. Utilizing assignment clauses in the deeds for tax-credit-generating conservation easements that reserve the State’s right to require the transfer of the easement to another certified conservation easement holder when the original holder ceases to exist; is no longer certified; or is unwilling, unable, or unqualified to enforce the terms and provisions of the easement.

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Introduction

The Conservation Easement Tax Credit Performance Audit seeks to determine whether there are effective internal controls in place at the Department of Revenue (DOR) and the Division of Real Estate (DRE) to ensure that conservation easement tax credits claimed and issued by taxpayers are valid. Recommendation 10 of the Performance Audit directs the DRE and DOR to evaluate options for protecting the State's investment in tax-credit-generating conservation easements when the conservation easement holder is no longer certified. The recommendation addresses the need to ensure the long-term value and benefit of the tax credit and notes that the State does not currently retain any long-term rights to ensure that conservation easements are maintained in perpetuity. Viable legislative and regulatory options are discussed below.

Problem Statement

When a conservation easement holder is no longer certified the State loses its ability through the certification process, to confirm the holder maintains, monitors, and defends the purposes of tax-credit-generating conservation easements in perpetuity.

The State Audit recognizes that the statutory and regulatory environment surrounding conservation easements is complex and that it is a challenge to provide the assurances necessary to protect the public interest in what is essentially a private transaction between the landowner and the organization acquiring the easement. The DRE is committed to evaluate potential statutory and/or regulatory changes to ensure that the State continues to receive the full benefit of tax-credit-generating conservation easements in the long term. Options for addressing this challenge include a range of statutory and/or regulatory changes that would grant DRE varying degrees of authority over uncertified conservation easement holders.

Although only a single organization has not renewed certification (of 43 originally certified organizations) since certification began in 2008, the perpetual duration of conservation easements, and the tax credit's 20-year carry forward, all but guarantee that the State will be faced with the challenge of protecting its investment in a tax-credit-generating conservation easement held by an organization that becomes uncertified for one reason or another. Currently, state statute [Section 12-61-720(11), C.R.S.] only grants DRE authority over organizations required to be certified, and applicable laws and rules do not allow DRE to investigate complaints regarding uncertified holders. Certification is only required if an organization wants to accept new conservation easements that would qualify for the state tax credit. Organizations may continue to hold conservation easements for which a state tax credit was claimed regardless of certification status.

At issue is the question of how to strengthen DRE's ability to investigate complaints regarding tax-credit-generating conservation easements that are held by uncertified organizations. Options for strengthening DRE's authority in fulfilling the audit recommendation fall into five broad categories: 1) increase the Division's investigation and/or enforcement authority; 2) create a new, sub-certification licensure; 3) expand certification to all holders of tax-credit-generating conservation easements; 4) require the use of an assignment clause in the deed of conservation easement; and 5) combine portions of the previous four categories. Each category contains varying possibilities and challenges, presented briefly in this report.

Increase Investigative Authority

Investigation

State statute could be changed to explicitly give DRE authority to audit and investigate complaints in order to identify issues of concern for all tax-credit-generating conservation easements. The authority to audit would be independent of third party complaints. For the first time, the State would have the ability to look at tax-credit-generating conservation easements held by uncertified holders. Specifically, this would allow DRE to gather information and assess the extent to which uncertified conservation easement holders fail to provide appropriate stewardship and defense of their easements for the public's long-term benefit. The State Audit notes that, as of August 2012, DRE has received five complaints about conservation easement holders but did not have jurisdiction to investigate four of these complaints because the holders were not certified. The State Audit confirmed that two of these holders held tax-credit-generating easements that were donated before the certification requirement took effect in 2008. The authority to audit and to look at complaints in this scenario would not extend to enforcement.

Investigation plus referral

In addition to the investigatory authority described above, DRE, in conjunction with DOR, could refer problematic organizations to an agency that already has enforcement power. The DOR has authority to refer tax issues to the Internal Revenue Service (IRS), and because most organizations that hold conservation easements are nonprofits, the potential referral of problematic conservation easement holders to the IRS would be a disincentive to qualified organizations contemplating a lapse in the stewardship or defense of its conservation easements. Regardless of their certification status, holders of conservation easements are unlikely to jeopardize their nonprofit status. State statute [Section 38-30.5-104(2), C.R.S.] requires the holder of a conservation easement to be a governmental entity or a nonprofit organization that is exempt under section 501(c)(3) of the federal Internal Revenue Code. Although government entities (26 USC §170(h)(1)) are less likely to be influenced by this disincentive, they are

accountable to the citizenry through the political process. Problematic government entities could be referred to elected officials.

The increases in investigatory authority described above have the benefit of being relatively easy to implement administratively with only modest increases in DRE resources and staff time. These options have the shortcoming, however, of leaving uncertified holders outside of DRE jurisdiction and possibly relying on the federal government for enforcement. Furthermore, recent history suggests that when the IRS is invited to investigate, as they were asked to do by DOR circa 2007 for state tax credits claiming federal tax deductions, the results are mixed and the enforcement outcomes uncertain.

Require Licensure for all Holders

Create Sub-certification Licensure

State statute could be changed to expand DRE's jurisdiction to organizations that currently do not require certification. This could conceivably come in the form of a new sub-certification license level for formerly certified organizations that would allow existing tax-credit-generating conservation easement holders that become uncertified to continue to hold those easements. Any such easements would have necessarily been donated previously when the organization was fully certified, or before 2008 prior to the certification requirement. Organizations would be required to submit to a lesser version of review in order to assess any changes to the organization and the entity's ability to continue to steward and defend the conservation easement to the satisfaction of the State. Such licensure would necessarily not affect current laws and rules that prevent the organization, not being fully certified, from accepting new conservation easement donations for which tax credits would be claimed.

Sub-certification licensure would require the organization to continue to monitor and steward any tax-credit-generating conservation easements. To this end, the organization would be required to meet a subset of qualifications for certification to hold conservation easements that have bearing on the holder's ability to continue as the easement holder. Specifically, Rule A-1, Section 5. (a.) & (c.) that outline the qualifications for certification to hold conservation easements. These rules establish that the organization is a qualified organization in good standing, with sufficient capacity to carry out its mission, and, further confirm that the organization has the appropriate stewardship practices and capacity to ensure long-term management of its conservation easements. In particular, the organization would be obligated to enforce every conservation easement, properly address violations, and maintain adequate, long-term stewardship and enforcement funds. The organization would have to show evidence that the necessary resources to accomplish these tasks are readily available. Such resources would include, but not be limited to, personnel, financial capacity, and policies and procedures.

Creating a new level of licensure has the benefit of directly addressing the problem of uncertified tax-credit-generating conservation easement holders. Changes in statute making a new license possible would need to be complemented by the authority for DRE to command the required additional resources and personnel. Under this scenario it would be necessary to identify the consequences for organizations that do not become either certified or licensed, let certification or licensure expire or have certification or licensure revoked.

Require Certification for all Conservation Easement Holders

Alternatively, state statute could be changed to require any organization holding a conservation easement that generated a tax credit to maintain full certification with DRE. This would serve to keep organizations within DRE oversight, while not requiring a new, sub-certification, license. In this scenario, the certification process would be mandatory for all holders of tax-credit-generating conservation easements – uncertified organizations holding tax-credit-generating conservation easements donated before 2008 would be required to become certified, and holders of tax-credit-generating easements donated since 2008 would be obligated to renew their certification each year. This option would directly close the gap in the State’s ability to identify when holders are no longer providing appropriate stewardship by eliminating an organization’s ability to both become uncertified and continue to hold tax-credit-generating conservation easements. Adhering to the requirements of certification, DRE would have the authority to review all aspects of the organizations’ conservation easement stewardship programs and holders would be subject to audits if deemed necessary by DRE. Under this scenario it would be necessary to identify the consequences for organizations that do not get certified, let certification expire or have certification revoked. DRE would need to be granted the authority to implement any identified consequences. Additionally, certification requires organizations to have policies and procedures in place for accepting new conservation easements. These requirements may not be necessary for all organizations, especially those not wanting to accept new conservation easements.

Expanding certification has the benefit of directly addressing problematic, uncertified tax-credit-generating conservation easement holders within an established process. A lesser degree of new administration may be required, compared to the licensure option. Moreover, none of the above options address the matter of what to do when a holder’s ability to maintain, monitor, and defend an easement cannot be redeemed.

CEOC Enforcement

State statute could be amended to give the Conservation Easement Oversight Commission (CEOC) standing to defend easements. Specifically, the enforcement statute [Section 38-30.5-

108(2), C.R.S.] could be amended as follows: *Actual or threatened injury to or impairment of a conservation easement in gross or the interest intended for protection by such easement may be prohibited or restrained by injunctive relief granted by any court of competent jurisdiction in a proceeding initiated by the grantor, by an owner of the easement, or, in those instances in which the conservation easement generated a tax credit in accordance with Section 39-22-522(2) C.R.S., by the Conservation Easement Oversight Commission created in Section 12-61-721 C.R.S.* This is consistent with the new pre-approval process for conservation easement tax credits, and the associated focus on individual transactions, that have also resulted from the State Audit (Recommendation 11).

This option is limited by the fact that the CEOC can only learn of potential violations through third party complaints. Moreover, this option would require the CEOC to have the staff and legal resources to appropriately respond to violations of conservation easements. At a minimum, it would be necessary to grant the CEOC authority to investigate potential violations of conservation easements. Due to conservation easements in Colorado numbering in the thousands this avenue could be cost prohibitive. This option is also unlikely to address all potential violations of conservation easements because of the reliance on third party reports of potential violations.

Assignment Clause

Any new authority to follow up with complaints against holders, regardless of their certification status, could be further supported by a means of transferring a tax-credit-generating conservation easement from an uncertified or unlicensed organization to a certified or licensed organization when problems of stewardship cannot be remedied to the State's satisfaction. An assignment clause transferring the conservation easement to another, certified or licensed organization may provide the necessary protections. There are three places where such an assignment clause could be made a part of the conservation easement tax-credit framework.

Assignment Clause as a Certification Requirement

As a requirement for Certification, language could be required in every deed of conservation easement for which a state tax credit will be claimed that reserves the State's right to require that the conservation easement be transferred to another certified or licensed conservation easement holder when the original holder no longer meets the minimum requirements for certification or licensure or is no longer certified or licensed. State statute currently does not require language in the deed of conservation easement regarding the authority of the State to intervene if the holder can no longer steward the donation. However, a ready solution to this oversight can be found in the protections currently required by the Great Outdoors Colorado Trust Fund (GOCO) for conservation easement acquisitions that it funds. To protect its investment, GOCO requires an

assignment clause be included in the deed of conservation easement. A similar assignment clause could be made mandatory for any conservation easement deed for which tax credits would be claimed. The assignment clause would reserve the State's right to require transfer of the easement to a different organization if the original easement holder ceases to exist; is no longer certified; or is unwilling, unable or unqualified to enforce the terms and the provisions of the easement. The precise language could be modified, but would trigger automatic assignment upon loss of certification. The assignment process could be subject to review by the CEOC should the CEOC be granted the increased authority, staff and legal resources described above.

GOCO Assignment Paragraph 18.b.

The Board shall have the right to require Grantee to assign its rights and obligations under this Easement to a different organization if Grantee ceases to exist; is unwilling unable, or unqualified to enforce the terms and provisions of this Easement; or is unwilling or unable to effectively monitor the Property for compliance with this Easement at least once every calendar year. Prior to any assignment under this Paragraph 18.b., the Board shall consult with Grantee and provide Grantee an opportunity to address the Board's concerns. If the Board's concerns are not addressed to its satisfaction, the Board may require that Grantee assign this Easement to an organization designated by the Board that complies with Paragraph 18.a.(1), (2), and (3) above.

Assignment Clause Required by Tax Credit Certificate Application

Alternatively, the State's right to require transfer of conservation easements to a certified holder can be reserved only if a tax credit is approved. That is, the language of the assignment clause could be made a requirement of the tax credit certificate application. Specifically, the Application for a Conservation Easement Tax Credit Certificate could have a requirement that the conservation easement contain language that declares DRE's right to require transfer to a certified organization. Conservation easement donations would be made subject to the assignment requirements only if an application for the tax credit is approved. Requiring an assignment clause through the tax credit certificate application process would shift the obligation of compliance to the taxpayer, and away from the accepting organization. This shift is contrary to the certification process – wherein the organization is responsible for compliance – and may therefore be problematic.

However it is accomplished, the addition of the assignment clause language has the benefit of providing a means for transferring tax-credit-generating conservation easements away from problematic organizations. However, regardless of the placement of the assignment clause language, the transfer of an easement demands that another qualified organization be ready and willing to accept the easement. Therefore, a mechanism needs to be developed for identifying and incentivizing qualified organizations in good standing to accept these transfers. The CEOC, working in conjunction with industry groups such as the Colorado Coalition of Land Trusts and

the Colorado Open Space Alliance, could be tasked with identifying organizations to accept assigned easements as part of the assignment review process.

Assignment in State Statute

State statute could be amended such that any conservation easement for which a tax credit is claimed is subject to the right of the State to require assignment. This option may not require assignment language to be included in the deed of conservation easement. As with the other options for giving the state the authority to assign the conservation easement to a new organization this option would only apply to new conservation easements.

A Combination Approach

The spectrum of options above, although presented separately, can be considered in varying combinations. The best response to the challenge of protecting the State's investment in tax-credit-generating conservation easements held by organizations that are no longer certified may be two or more of these options together. For example, increasing DRE's investigatory authority *and* expanding the CEOC's enforcement power, *and* the implementation of assignment might together comprise the best response. Another possible combination could be the expansion of certification to all conservation easement holders *and* implementation of assignment language.