



CO L O R A D O

**Department of
Regulatory Agencies**

Colorado Office of Policy, Research &
Regulatory Reform

**2017 Sunset Review:
Certification of Conservation Easement
Holders and the
Conservation Easement Oversight Commission**

October 13, 2017



COLORADO

**Department of
Regulatory Agencies**

Executive Director's Office

October 13, 2017

Members of the Colorado General Assembly
c/o the Office of Legislative Legal Services
State Capitol Building
Denver, Colorado 80203

Dear Members of the General Assembly:

The Colorado General Assembly established the sunset review process in 1976 as a way to analyze and evaluate regulatory programs and determine the least restrictive regulation consistent with the public interest. Since that time, Colorado's sunset process has gained national recognition and is routinely highlighted as a best practice as governments seek to streamline regulation and increase efficiencies.

Section 24-34-104(5)(a), Colorado Revised Statutes (C.R.S.), directs the Department of Regulatory Agencies to:

- Conduct an analysis of the performance of each division, board or agency or each function scheduled for termination; and
- Submit a report and supporting materials to the office of legislative legal services no later than October 15 of the year preceding the date established for termination.

The Colorado Office of Policy, Research and Regulatory Reform (COPRRR), located within my office, is responsible for fulfilling these statutory mandates. Accordingly, COPRRR has completed the evaluation of the Division of Real Estate's (Division) certification of conservation easement holders and the Conservation Easement Oversight Commission (Commission). I am pleased to submit this written report, which will be the basis for COPRRR's oral testimony before the 2018 legislative committee of reference.

The report discusses the question of whether there is a need for the regulation provided under Sections 724 and 725 of Article 12 of Title 61, C.R.S. The report also discusses the effectiveness of the Commission and the Director of the Division and staff in carrying out the intent of the statutes and makes recommendations for statutory and administrative changes in the event this regulatory program is continued by the General Assembly.

Sincerely,

Marguerite Salazar
Executive Director





COLORADO

Department of Regulatory Agencies

Colorado Office of Policy, Research &
Regulatory Reform

2017 Sunset Review

Certification of Conservation Easement Holders and the Conservation Easement Oversight Commission

SUMMARY

What is a conservation easement?

A conservation easement is a voluntary legal agreement between a landowner and a land trust or government agency (easement holders) that permanently limits uses of the land in order to protect its conservation value.

Why is it regulated?

Colorado taxpayers who donate conservation easements to certified conservation easement holders may claim an income tax credit valued at 75 percent of the first \$100,000 of the fair market value of the easement, and 50 percent of the easement's value over \$100,000, not to exceed \$1.5 million. The total of all tax credits issued in Colorado cannot exceed \$45 million per tax year.

Who is regulated?

For a taxpayer to claim a tax credit, the conservation easement must be donated to a Division of Real Estate (Division)-certified easement holder. To be certified, the easement holder must be a nonprofit or governmental entity and submit documentation relating to its finances, mission and conservation easement projects. Certificates must be renewed annually. In calendar year 2016, the Division certified 42 conservation easement holders.

How are conservation easement tax credits issued?

To claim a conservation easement tax credit, the landowner must donate the easement to a certified easement holder and obtain a conservation easement tax credit certificate from the Division. To obtain a certificate, the landowner must submit, among other things, a conservation easement appraisal and must demonstrate that the easement serves a valid conservation purpose. The Division is responsible for, among other things, reviewing the appraisal to ensure that it is credible. The Conservation Easement Oversight Commission (Commission) is responsible for reviewing the easement's conservation purpose.

What does it cost to operate the program?

In fiscal year 15-16, the Division spent \$506,124 and employed 3.7 full-time equivalent employees administering the conservation easement tax credit program.

What disciplinary activity is there?

The Division received six complaints against conservation easement holders, all between 2010 and 2015. All but one of these were dismissed for lack of jurisdiction. In one instance in 2010, the Division issued an order to cease and desist from accepting conservation easements under the tax credit program without being certified by the Division.

KEY RECOMMENDATIONS

Continue the certification of conservation easement holders and the Commission for seven years, until 2025.

The easement holder certification program was enacted to establish minimum qualifications that encourage professionalism and stability and to prevent fraudulent or unqualified applicants from receiving conservation easements claiming tax credits. Vigilance remains necessary to protect the public welfare and to prevent fraud. Similarly, the Commission's continued existence is necessary to help prevent fraud and to ensure that conservation easement donations satisfy qualified conservation purposes.

Alter the size and composition of the Commission, effective July 1, 2019, to comprise seven members.

One of the primary tasks of the Commission is to consult with the Department of Revenue (DOR) regarding tax credits claimed for years prior to 2014. The Commission's composition reflects this mission. However, since DOR can look back at tax returns for only four years, this task will become less frequent as of 2018, calling into question the required expertise going forward. Additionally, greater public participation on the Commission will bring greater transparency. Therefore, the Commission's composition should be altered to comprise one representative each from the Department of Natural Resources and the Department of Agriculture, two representatives of the easement holder community, two members of the general public and one member with expertise in analyzing the conservation purpose of conservation easements.

METHODOLOGY

As part of this review, Colorado Office of Policy, Research and Regulatory Reform (COPRRR) staff attended Commission meetings; interviewed Division staff, Commission members, officials with state and national industry and professional associations, appraisers, landowners, representatives of land trusts, tax credit brokers and other stakeholders; and reviewed Colorado statutes and rules, as well as the laws of other states. Additionally, COPRRR conducted four surveys: Landowners, Certified General Appraisers, Qualified Appraisers and Certified Conservation Easement Holders.

MAJOR CONTACTS MADE DURING THIS REVIEW

Board of Real Estate Appraisers Members
Colorado Cattlemen's Agricultural Land Trust
Colorado Coalition of Land Trusts
Colorado Department of Natural Resources
Colorado Department of Revenue
Colorado Division of Real Estate
Colorado Farm Bureau
Colorado Livestock Association
Colorado Natural Heritage Program
Colorado Nonprofit Association
Colorado Open Lands

Colorado Outfitters Association
Colorado Society of Certified Public Accountants
Conservation Easement Oversight Commission
Members
Gates Family Foundation
Great Outdoors Colorado
Land Trust Alliance
National Council of State Legislatures
Office of the Colorado Attorney General
The Trust for Public Land

What is a Sunset Review?

A sunset review is a periodic assessment of state boards, programs, and functions to determine whether they should be continued by the legislature. Sunset reviews focus on creating the least restrictive form of regulation consistent with protecting the public. In formulating recommendations, sunset reviews consider the public's right to consistent, high quality professional or occupational services and the ability of businesses to exist and thrive in a competitive market, free from unnecessary regulation.

Sunset Reviews are prepared by:
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Colorado Office of Policy, Research and Regulatory Reform
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Background

Introduction

Enacted in 1976, Colorado's sunset law was the first of its kind in the United States. A sunset provision repeals all or part of a law after a specific date, unless the legislature affirmatively acts to extend it. During the sunset review process, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) within the Department of Regulatory Agencies (DORA) conducts a thorough evaluation of such programs based upon specific statutory criteria¹ and solicits diverse input from a broad spectrum of stakeholders including consumers, government agencies, public advocacy groups, and professional associations.

Sunset reviews are based on the following statutory criteria:

- Whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulation;
- If regulation is necessary, whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms and whether agency rules enhance the public interest and are within the scope of legislative intent;
- Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures and practices and any other circumstances, including budgetary, resource and personnel matters;
- Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;
- Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates;
- The economic impact of regulation and, if national economic information is not available, whether the agency stimulates or restricts competition;
- Whether complaint, investigation and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession;
- Whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action;

¹ Criteria may be found at § 24-34-104, C.R.S.

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- Whether the agency through its licensing or certification process imposes any disqualifications on applicants based on past criminal history and, if so, whether the disqualifications serve public safety or commercial or consumer protection interests. To assist in considering this factor, the analysis prepared pursuant to subparagraph (i) of paragraph (a) of subsection (8) of this section shall include data on the number of licenses or certifications that were denied, revoked, or suspended based on a disqualification and the basis for the disqualification; and
 - Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.

Types of Regulation

Consistent, flexible, and fair regulatory oversight assures consumers, professionals and businesses an equitable playing field. All Coloradans share a long-term, common interest in a fair marketplace where consumers are protected. Regulation, if done appropriately, should protect consumers. If consumers are not better protected and competition is hindered, then regulation may not be the answer.

As regulatory programs relate to individual professionals, such programs typically entail the establishment of minimum standards for initial entry and continued participation in a given profession or occupation. This serves to protect the public from incompetent practitioners. Similarly, such programs provide a vehicle for limiting or removing from practice those practitioners deemed to have harmed the public.

From a practitioner perspective, regulation can lead to increased prestige and higher income. Accordingly, regulatory programs are often championed by those who will be the subject of regulation.

On the other hand, by erecting barriers to entry into a given profession or occupation, even when justified, regulation can serve to restrict the supply of practitioners. This not only limits consumer choice, but can also lead to an increase in the cost of services.

There are also several levels of regulation.

Licensure

Licensure is the most restrictive form of regulation, yet it provides the greatest level of public protection. Licensing programs typically involve the completion of a prescribed educational program (usually college level or higher) and the passage of an examination that is designed to measure a minimal level of competency. These types of programs usually entail title protection - only those individuals who are properly licensed may use a particular title(s) - and practice exclusivity - only those individuals who are properly licensed may engage in the particular practice. While these requirements can be viewed as barriers to entry, they also afford the highest level of consumer protection in that they ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

Certification

Certification programs offer a level of consumer protection similar to licensing programs, but the barriers to entry are generally lower. The required educational program may be more vocational in nature, but the required examination should still measure a minimal level of competency. Additionally, certification programs typically involve a non-governmental entity that establishes the training requirements and owns and administers the examination. State certification is made conditional upon the individual practitioner obtaining and maintaining the relevant private credential. These types of programs also usually entail title protection and practice exclusivity.

While the aforementioned requirements can still be viewed as barriers to entry, they afford a level of consumer protection that is lower than a licensing program. They ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

Registration

Registration programs can serve to protect the public with minimal barriers to entry. A typical registration program involves an individual satisfying certain prescribed requirements - typically non-practice related items, such as insurance or the use of a disclosure form - and the state, in turn, placing that individual on the pertinent registry. These types of programs can entail title protection and practice exclusivity. Since the barriers to entry in registration programs are relatively low, registration programs are generally best suited to those professions and occupations where the risk of public harm is relatively low, but nevertheless present. In short, registration programs serve to notify the state of which individuals are engaging in the relevant practice and to notify the public of those who may practice by the title(s) used.

Title Protection

Finally, title protection programs represent one of the lowest levels of regulation. Only those who satisfy certain prescribed requirements may use the relevant prescribed title(s). Practitioners need not register or otherwise notify the state that they are engaging in the relevant practice, and practice exclusivity does not attach. In other words, anyone may engage in the particular practice, but only those who satisfy the prescribed requirements may use the enumerated title(s). This serves to indirectly ensure a minimal level of competency - depending upon the prescribed preconditions for use of the protected title(s) - and the public is alerted to the qualifications of those who may use the particular title(s).

Licensing, certification and registration programs also typically involve some kind of mechanism for removing individuals from practice when such individuals engage in enumerated proscribed activities. This is generally not the case with title protection programs.

Regulation of Businesses

Regulatory programs involving businesses are typically in place to enhance public safety, as with a salon or pharmacy. These programs also help to ensure financial solvency and reliability of continued service for consumers, such as with a public utility, a bank or an insurance company.

Activities can involve auditing of certain capital, bookkeeping and other recordkeeping requirements, such as filing quarterly financial statements with the regulator. Other programs may require onsite examinations of financial records, safety features or service records.

Although these programs are intended to enhance public protection and reliability of service for consumers, costs of compliance are a factor. These administrative costs, if too burdensome, may be passed on to consumers.

Sunset Process

Regulatory programs scheduled for sunset review receive a comprehensive analysis. The review includes a thorough dialogue with agency officials, representatives of the regulated profession and other stakeholders. Anyone can submit input on any upcoming sunrise or sunset review on COPRRR's website at: www.dora.colorado.gov/opr.

The functions of the Conservation Easement Oversight Commission (Commission) and the Director of the Division of Real Estate (Director and Division, respectively) as enumerated in Sections 724 and 725 of Article 12 of Title 61, Colorado Revised Statutes (C.R.S.), shall terminate on July 1, 2018, unless continued by the General Assembly. During the year prior to this date, it is the duty of COPRRR to conduct an analysis and evaluation of the certification of conservation easement holders and the Commission pursuant to section 24-34-104, C.R.S. Importantly, only these two provisions are subject to sunset review.

The purpose of this review is to determine whether the currently prescribed program to regulate conservation easement holders, as well as the Commission, should be continued and to evaluate the performance of the Commission and the staff of the Division. During this review, the Commission and the Director must demonstrate that the program serves the public interest. COPRRR's findings and recommendations are submitted via this report to the Office of Legislative Legal Services.

Methodology

As part of this review, COPRRR staff attended Commission meetings; interviewed Division staff, Commission members, officials with state and national industry and professional associations, appraisers, landowners, representatives of land trusts, tax credit brokers and other stakeholders; and reviewed Colorado statutes and rules, as well as the laws of other states.

In June 2017, COPRRR conducted three distinct surveys related to this sunset review:²

Survey of Landowners. A link to the survey was sent via email to 100 landowners who donated a conservation easement and received a conservation easement tax credit between January 2014 and May 2017. This encompasses all of such landowners for whom the Division was able to provide email addresses. Of these, an estimated 94 were successfully delivered and 20 individuals responded. This represents a response rate of 21.2 percent. Survey questions and responses may be found in Appendix A.

Survey of Qualified Appraisers. A link to the survey was sent via email to the 14 appraisers who had completed the Conservation Easement Appraiser Update Course as of May 31, 2017, as well as seven additional appraisers known to work on conservation easements but who had not yet completed the course. All 21 of these emails were successfully delivered and 6 individuals responded. This represents a response rate of 28.6 percent. Survey questions and responses may be found in Appendix B.

Survey of Certified General Appraisers. A link to the survey was sent via email to the 971 certified general appraisers who had not completed the Conservation Easement Appraiser Update Course as of May 31, 2017. Of these, an estimated 942 were successfully delivered and 93 individuals responded. This represents a response rate of 9.9 percent. Survey questions and responses may be found in Appendix C.

In August 2017, COPRRR conducted a fourth survey related to this sunset review:

Survey of Certified Conservation Easement Holders. A link to the survey was sent via email to all 40 of the conservation easement holders holding a valid certification as of August 1, 2017. All were successfully delivered and 22 individuals responded. This represents a response rate of 55 percent. Survey questions and responses may be found in Appendix D.

² For all surveys, successful delivery is deemed to have occurred when the email sending the survey was not returned or did not fail.

Profile of Conservation Easements

The ownership of real property, in essence, consists of owning a bundle of rights. These rights include the right to occupy, lease, sell, develop, farm, ranch, construct buildings and many others. A property owner may give up one or more of these rights, yet still retain the others. In ceding a right, the property owner “eases” it to another entity.³

Thus, a conservation easement constitutes,

a voluntary legal agreement between a landowner and a land trust or government agency that permanently limits uses of the land in order to protect its conservation values.⁴

The conservation easement holder or donee entity (i.e., a land trust or government entity) has the right to perpetually restrict the donor and any future owners of that land from using the land in ways that would be inconsistent with the intended protection.

In 1957, Maryland became the first state to authorize conservation easements.⁵ In 1976, the federal government enacted the first tax benefit for gifts of conservation easements.⁶ Colorado and many states soon followed, encouraging the conservation of land through the use of conservation easements by allowing tax deductions and, to a lesser extent, granting tax credits.

Some key concepts intrinsic to modern conservation easements and the accompanying tax benefits are the permanent nature of the easements, the organizations to which the easements are granted and the conservation value (often referred to as conservation purpose) of the easements.

The Internal Revenue Code (IRC) recognizes the following as valid conservation purposes:⁷

- The preservation of land areas for outdoor recreation by, or the education of, the general public;
- The protection of a relatively natural habitat of fish, wildlife or plants, or similar ecosystem;

³ The Nature Conservancy. *Conservation Easements: All About Conservation Easements*. Retrieved on May 9, 2017, from www.nature.org/about-us/private-lands-conservation/conservation-easements/all-about-conservation-easements.xml

⁴ Land Trust Alliance. *Questions? Conservation Easements*. Retrieved on July 13, 2017, from www.landtrustalliance.org/what-you-can-do/conservation-your-land/questions

⁵ Land Trust Alliance, “Amending Conservation Easements: Evolving Practices and Legal Principles,” 2nd Edition (2017), p. 132.

⁶ A. Looney, “Charitable Contributions of Conservation Easements,” The Brookings Institution (May 2017), p. 8.

⁷ 26 U.S.C. § 170(h)(4)(A).

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- The preservation of open space (including farmland and forest land) where such preservation is for the scenic enjoyment of the general public or pursuant to a clearly delineated federal, state or local government conservation policy, that will yield a significant public benefit; or
 - The preservation of an historically important land area or certified historic structure.

The federal government and most states require a conservation easement to be granted in perpetuity in order to claim the relevant tax benefit. The tax benefit is predicated upon the notion of charitable donations. As a result, to claim a tax benefit, the federal government and most states require that the easement be donated to a governmental agency (i.e., the open space department of a local government, or state agency such as Colorado Parks and Wildlife) or a charitable organization (i.e., an organization that operates under a 501(c)(3) exemption to the IRC, such as a land trust).

As part of this sunset review, COPRRR conducted a survey of organizations certified by the Division to receive conservation easement donations; the response rate was 55 percent. When asked to provide an estimate as to the number of conservation easements held that involved a state tax credit, nearly half (45.5 percent) of respondents indicated that more than 75 percent of their easements involved a tax credit.

To be sure, creating a conservation easement and claiming any associated tax benefits is often a lengthy and expensive process. However, it all begins with a property owner deciding to donate a conservation easement.

As part of this sunset review, COPRRR conducted a survey of landowners who claimed a Colorado conservation easement tax credit between January 2014 and May 2017; the response rate was 21.2 percent. When asked to identify the most important factor in deciding whether to donate a conservation easement, half of respondents indicated that they donated their easement to protect or conserve the land as it is today.

Once the property owner decides to donate a conservation easement, the next step may include selecting the entity to which the easement will be donated. When asked to identify the most important factor in deciding to which entity the easement would be donated, approximately half of respondents cited the regional focus of the land trust and just under a third (30 percent) cited the land trust's focus on agricultural or ranch land.

Entities that are land trusts may seek accreditation from the Land Trust Accreditation Commission (LTAC), an independent program of the Land Trust Alliance, which is a national organization. In Colorado, 22 land trusts are accredited by LTAC: 18 local land trusts and 4 national land trusts.

Regardless of how the property owner made these decisions, creating and conveying a conservation easement is a complicated matter, and typically involves the professional services of attorneys, tax advisors, consultants and real estate appraisers. These professionals may prepare, among other things, the conservation easement deed, the baseline and mineral reports and an appraisal report.

Conservation easement appraisals are necessary to determine the value of the conservation easement, which in turn is necessary to calculate the applicable tax deduction or tax credit. The value of the conservation easement is, generally, the value of the property at its highest and best use—what will bring the owner maximum economic return—less the value as encumbered by the conservation easement.⁸

Conservation easement appraisals can be complicated and, when they are to be used to claim either a Colorado tax credit or a federal income tax deduction, they must be prepared by a qualified appraiser. In Colorado, the Board of Real Estate Appraisers (BOREA) is tasked with establishing any additional criteria to become such an appraiser. In short, an individual must be an active certified general appraiser in good standing who has completed the Conservation Easement Appraiser Update Course designed by BOREA. As of May 31, 2017, Colorado licensed 992 certified general appraisers, of whom only 14 were considered qualified to perform conservation easement appraisals.

As part of this sunset review, COPRRR conducted a survey of qualified appraisers (response rate was 28.6 percent) and one of certified general appraisers (response rate was 9.9 percent).

Two-thirds of the respondents to COPRRR's survey of qualified appraisers indicated having attained education above and beyond that required by BOREA.

While approximately a third of respondents to the survey of certified general appraisers indicated having considered conducting conservation appraisal work, the responses indicating the reasons for not engaging in such work varied. Although respondents could select multiple responses, fear of civil liability or professional discipline was cited by a large percentage of them.

It is not unusual for the landowner to also make a cash donation to the donee organization. This enables the conservation easement holder to establish two dedicated funds from which it can draw to pay for the monitoring and enforcement of the easement. Approximately half (45.5 percent) of the respondents to COPRRR's survey of certified easement holders indicated that more than 75 percent of the easement donations received by them were accompanied by a cash donation.

⁸ P. Reilly, "Brookings Institution Takes on Biggest Charitable Tax Break Used by President Trump," *Forbes*. Retrieved on June 26, 2017, from www.forbes.com/sites/peterjreilly/2017/06/24/brookings-institution-takes-on-biggest-charitable-tax-break-used-by-president-trump/?utm_source=followingweekly&utm_medium=email&utm_campaign=20170626#3e55a3b41953

Further, it is not uncommon for an easement to involve both a donation and a cash sale, often referred to as a bargain sale. A bargain sale occurs when,

the landowner receives a cash payment for a portion of the appraised fair market value of the conservation easement and donates the remaining value.⁹

Once the conservation easement has been conveyed to the donee organization, the qualified appraisal has been signed and delivered to the donor of the easement and the deed of conservation easement has been properly recorded, the landowner may seek a conservation easement tax credit from the State of Colorado by applying to the Division. Table 1 illustrates, for the years indicated, the number of easements for which a tax credit was approved, the total acres protected by those easements, and the tax credit totals involved. Since tax credits are issued according to the year in which the easement was donated, and since a landowner may seek a tax credit subsequent to the actual donation, the application for a tax credit for a particular cap year may be submitted several years after the donation was actually made. Importantly, the data in Table 1 are presented for the cap years indicated and do not necessarily indicate the number of applications submitted in those years.

Table 1
Number of Conservation Easements, Protected Acreage and Tax Credit Values by Cap Year

Calendar Year	Number of Conservation Easements	Acreage Protected	Value of Tax Credits Approved
2012	86	113,314	\$22,000,000
2013	74	52,579	\$28,240,269
2014	48	79,942	\$11,859,014
2015	40	66,201	\$17,169,009
2016	28	46,650	\$7,998,082
Total	276	356,686	\$87,266,374

The data reported in Table 1 were current as of August 10, 2017, and are subject to change as additional tax credit certificate applications are received, particularly for 2015 and 2016.

⁹ A. Seidl, et al, *Investing in Colorado—Colorado’s Return on Investments in Conservation Easements: Conservation Easement Tax Credit Program and Great Outdoors Colorado*, Colorado State University, 2017, p. 7.

For perspective, according to the Colorado Ownership, Management and Protection service,

almost 38 million acres of land are privately owned, or owned by nonprofit organizations, such as land trusts, in Colorado. This represents all land available for protection under conservation easements through the [conservation easement tax credit program and Great Outdoors Colorado (GOCO)]. Of these available lands, 5.5 percent is currently protected with the help of the Conservation Easement Tax Credit program or GOCO. Thus, while these conservation easements only constitute 5.5 percent of all private lands, they protect 10 percent of all private land acres in Rank 1 Crucial Habitat, 9 percent of all private land acres in Rank 2 Crucial Habitat, and 6 percent of all private land acres in Rank 3 Crucial Habitat.¹⁰

Furthermore, conserved lands also have,

other agricultural, scenic, and natural values. For instance, these efforts have conserved over 290,000 acres of designated prime farmland, over 4,100 miles of stream, creek or river frontage throughout the state, and roughly 9 percent and 19 percent of Greater Sage-Grouse and Gunnison Sage-Grouse Production Areas, respectively.¹¹

Once a conservation easement tax credit certificate is issued by the Division, the landowner may elect to utilize the credits himself or herself over the course of the next 20 years, or transfer all or a portion of the credits to another Colorado taxpayer. When landowners were asked whether they had sold or otherwise transferred any portion of their tax credits, the vast majority (85 percent) of respondents to COPRRR's survey indicated that they already had or had plans to do so.

Regardless of the reasons for donating a conservation easement, and regardless of whether the landowner retained the tax credits for personal use or transferred them, a recent study at Colorado State University found:

Residents of Colorado have received an estimated \$5.5-\$13.7 billion (US\$2017) of economic benefits from land conserved by conservation easements while the State has invested roughly \$1.1 billion (US\$2017)—through approximately \$280 million from GOCO and \$772 million from the Conservation Easement Tax Credit program on these efforts since 1995. This represents roughly \$4-\$12 of public benefits provided by conserved land for each \$1 invested by the State and a benefit per acre of about \$2,700-\$6,600 against an investment of about \$500 in real 2017 dollars.¹²

¹⁰ A. Seidl, et al, *Investing in Colorado—Colorado's Return on Investments in Conservation Easements: Conservation Easement Tax Credit Program and Great Outdoors Colorado*, Colorado State University, 2017, p. 14.

¹¹ A. Seidl, et al, *Investing in Colorado—Colorado's Return on Investments in Conservation Easements: Conservation Easement Tax Credit Program and Great Outdoors Colorado*, Colorado State University, 2017, p. 14.

¹² A. Seidl, et al, *Investing in Colorado—Colorado's Return on Investments in Conservation Easements: Conservation Easement Tax Credit Program and Great Outdoors Colorado*, Colorado State University, 2017, p. 3.

While the range represented by these figures shows the difficulty in pinpointing an exact dollar figure for return on investment, it appears that the return on investment is, at the very least, positive.

Most states authorize the creation and donation of conservation easements and at least 14, including Colorado, authorize tax credits. Not surprisingly, no two states operate conservation easement tax credit programs the same way. Appendix E illustrates some of the salient features of the conservation easement tax credit programs among these states.

Regardless of the manner in which a state operates its conservation easement program, and regardless of whether a particular state grants a tax credit or a tax deduction, some estimate that nationwide, land trusts hold approximately 9 million acres of land in conservation easements.¹³ Additionally, total federal tax deductions in 2014 attributable to donated conservation easements amounted to \$3.2 billion.¹⁴

¹³ D. Gattuso, "Conservation Easements: The Good, the Bad, and the Ugly," *National Policy Analysis*, p. 4. Retrieved October 27, 2016, from www.nationalcenter.org/NPA569.html

¹⁴ A. Looney, "Charitable Contributions of Conservation Easements," The Brookings Institution (May 2017), p. 3.

Legal Framework

History of Regulation

Through Senate Bill 76-059, the General Assembly, for the first time, defined conservation easements and delineated how to create them, requiring, among other things, that they be donated to governmental entities or charitable organizations exempt under section 501(c)(3) of the Internal Revenue Code (IRC).

The General Assembly revisited conservation easements in 1999, when it passed House Bill 99-1155 (HB 1155). This bill created the conservation easement tax credit, commencing with tax year 2000, by allowing a taxpayer who donates a conservation easement in perpetuity to claim a tax credit in an amount equal to the fair market value of the donated portion of the easement, not to exceed \$100,000. To claim the tax credit, the taxpayer was required to submit a “qualified appraisal” (as defined in federal regulations) to the Colorado Department of Revenue (DOR) at the time the taxpayer filed his or her Colorado state income tax return. Finally, HB 1155 allowed the taxpayer to carry forward any unused portion of the tax credit for up to 20 years.

The General Assembly has altered the manner in which the tax credit is calculated several times over the years.

House Bill 00-1348, among other things, authorized the transfer of conservation easement tax credits from the donor to other taxpayers.

Responding to abuses of the conservation easement tax credit, the General Assembly passed House Bill 08-1353 (HB 1353), which instituted several substantial reforms. First, the bill required real estate appraisers who prepare conservation easement appraisals to submit those appraisals to the Colorado Division of Real Estate (Division), which was authorized to review the information submitted. The bill also empowered the Colorado Board of Real Estate Appraisers (BOREA) to establish education and experience requirements for appraisers who prepare such appraisals.

Next, HB 1353 created, in the Division, a certification program for conservation easement holders to establish the minimum qualifications of such holders and to identify fraud. The Division was authorized to collect fees necessary to cover the costs of the certification program.

House Bill 1353 also created the nine-member Conservation Easement Oversight Commission (Commission) to advise the Division and DOR regarding conservation easements; review, at the request of the Division or DOR, conservation easement transactions, applications and other documents; advise the Division or DOR regarding conservation value, the capacity of conservation easement holders and the integrity and accuracy of conservation easement transactions related to the tax credits; and review conservation easement holder certification applications.

House Bill 10-1197 capped the value of all conservation easement tax credits that could be claimed for tax years 2011, 2012 and 2013 at \$26 million per year. To ensure that this cap was not surpassed, the General Assembly created a process whereby taxpayers seeking to claim a conservation easement tax credit for those three tax years had to submit to the Division a claim for the credit. The Division, in turn, was required to issue a tax credit certificate to taxpayers, in the order in which the claims were submitted, up to the maximum for each year.

House Bill 11-1300 created a system for contesting DOR's disallowance of a conservation easement tax credit, reduced the maximum value of all such tax credits claimed in tax years 2011 and 2012 to \$22 million and increased such maximum to \$34 million for tax year 2013.

Senate Bill 13-221 (SB 221) again instituted major reforms by, among other things, creating a tax credit application and review process within the Division and authorizing the Division to collect fees to cover the associated costs. Further, SB 221 vested the Director of the Division (Director) with the authority to determine the credibility of the appraisal and the Commission with the authority to determine whether the conservation easement constitutes a qualified conservation contribution.

House Bill 13-1183 increased to \$45 million the maximum value of all conservation easement tax credits claimed in any tax year beginning with 2014.

Senate Bill 14-117 stipulated that DOR cannot disallow a conservation easement tax credit based on any requirement within the jurisdiction of the Division, Director or Commission.

Finally, Senate Bill 15-206 adjusted the manner in which conservation easement tax credits are to be calculated. Beginning with tax year 2015, the tax credit is calculated as 75 percent of the first \$100,000 of the fair market value of the donated conservation easement, and 50 percent of all amounts in excess of \$100,000, not to exceed \$1.5 million.

Federal Law

The IRC allows for income tax deductions on any charitable contribution made within a taxable year,¹⁵ including qualified conservation contributions.¹⁶ Such contributions must consist of a contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes.¹⁷

A qualified real property interest is, among other things, a restriction, granted in perpetuity, on the use which may be made of the real property.¹⁸ A conservation easement is such a restriction.

¹⁵ 26 U.S.C. § 170(a)(1).

¹⁶ 26 U.S.C. § 170(h).

¹⁷ 26 U.S.C. § 170(h)(1).

¹⁸ 26 U.S.C. § 170(h)(2).

Qualified organizations, in general, are charitable organizations or governmental entities.¹⁹

Finally, the IRC recognizes the following as valid conservation purposes:²⁰

- The preservation of land areas for outdoor recreation by, or the education of, the general public;
- The protection of a relatively natural habitat of fish, wildlife or plants, or similar ecosystem;
- The preservation of open space (including farmland and forest land) where such preservation is for the scenic enjoyment of the general public or pursuant to a clearly delineated federal, state or local government conservation policy, that will yield a significant public benefit; or
- The preservation of an historically important land area or certified historic structure.

In short, a taxpayer may claim a federal income tax deduction when donating a perpetual conservation easement to a qualified organization for a recognized conservation purpose.

Colorado Law

Under state law, a conservation easement is,

a right in the owner of the easement to prohibit or require a limitation upon or an obligation to perform acts on or with respect to a land or water area, airspace above the land or water, or water rights beneficially used upon that land or water area, owned by the grantor appropriate to the retaining or maintaining of such land, water, airspace, or water rights, including improvements, predominantly in natural, scenic, or open condition, or for wildlife habitat, or for agricultural, horticultural, wetlands, recreational forest, or other use or condition consistent with the protection of open land, environmental quality or life-sustaining ecological diversity, or appropriate to the conservation and preservation of buildings, sites, or structures having historical, architectural, or cultural interest or value.²¹

Instruments creating, assigning or otherwise transferring conservation easements must be properly recorded.²²

¹⁹ 26 U.S.C. § 170(h)(3).

²⁰ 26 U.S.C. § 170(h)(4)(A).

²¹ § 38-30.5-102, C.R.S.

²² § 38-30.5-106, C.R.S.

An income tax credit is available to each taxpayer who donates all or part of the value of a perpetual conservation easement to a governmental entity or a qualified charitable organization. The tax credit is allowable only for those donations satisfying the requirements of the IRC.²³

For those conservation easements donated on or after January 1, 2015, the conservation easement tax credit is calculated as 75 percent of the first \$100,000 of the fair market value of the conservation easement, and 50 percent of all amounts in excess of \$100,000. In no case can a conservation easement tax credit exceed \$1.5 million per donation,²⁴ and the aggregate maximum value of conservation easement tax credits issued per tax year must not exceed \$45 million.²⁵

To claim a conservation easement tax credit, the taxpayer must submit to DOR, among other things, a conservation easement tax credit certificate issued by the Division.²⁶ DOR is expressly denied the authority to disallow a tax credit based on any requirements that fall within the jurisdiction of the Division, the Director or the Commission.²⁷

To obtain a conservation easement tax credit certificate, the taxpayer must submit a claim for the tax credit to the Division. The Division, in turn, is required to issue tax credit certificates for the claims received in the order submitted.²⁸

The purpose of the Division's tax credit application process is to determine whether a conservation easement donation for which a tax credit is claimed:²⁹

- Is a contribution of a qualified real property interest to a qualified organization to be used exclusively for a conservation purpose,
- Is substantiated with a qualified appraisal prepared by a qualified appraiser in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP), and
- Otherwise complies with legal requirements.

A complete tax credit certificate application must include:³⁰

- A copy of the final conservation easement appraisal,
- A copy of the recorded deed granting the conservation easement,
- Documentation supporting the conservation purpose of the easement,
- Any other information or documentation the Director or the Commission deems necessary, and
- The required fee.

²³ § 39-22-522(2), C.R.S.

²⁴ § 39-22-522(4)(a)(II.5), C.R.S.

²⁵ § 39-22-522(2.5), C.R.S.

²⁶ § 39-22-522(3.6)(a)(I), C.R.S.

²⁷ § 12-61-727(4), C.R.S.

²⁸ § 39-22-522(2.5), C.R.S.

²⁹ § 12-61-727(2)(a), C.R.S.

³⁰ § 12-61-727(5), C.R.S.

The Division must issue a tax credit certificate, or document any deficiencies in the application, within, on average, 120 days of receiving a completed application.³¹ If a notice of deficiency is issued, the landowner has 60 days to address the problems.³² Upon receipt of the additional information, the Director and the Commission have 90 days within which to make a final determination.³³

Any denials may be appealed in accordance with the State Administrative Procedure Act.³⁴

Additionally, a landowner may submit a proposed conservation easement donation to the Division to obtain a preliminary advisory opinion, which may address the proposed deed of conservation easement, the appraisal, the conservation purpose or other relevant aspect of the transaction.³⁵

Finally, any information submitted as part of a tax credit application or application for preliminary advisory opinion is not subject to public inspection under the Colorado Open Records Act.³⁶

In approving applications, the Director and the Commission have articulated, statutory roles and responsibilities:

- The Director has the authority and responsibility to determine the credibility of the appraisal³⁷ and whether an organization is qualified to accept a conservation easement donation.³⁸
- The Commission has the authority and responsibility to determine whether a conservation easement donation is a qualified contribution.³⁹

The role of the appraisal in the application review process cannot be overstated. The Director has the “authority and responsibility” to determine the credibility of the appraisal. In making such determination, the Director must consider, at a minimum, whether:⁴⁰

- The appraisal is a qualified appraisal from a qualified appraiser,
- The appraisal conforms to USPAP,
- The appraiser holds a valid Colorado license as a certified general appraiser, and
- The appraiser satisfies any education and experience requirements established by BOREA.

³¹ §§ 12-61-727(7)(a) and -727(10), C.R.S.

³² § 12-61-727(7)(b), C.R.S.

³³ § 12-61-727(7)(c), C.R.S.

³⁴ § 12-61-727(12)(c), C.R.S.

³⁵ § 12-61-727(14)(a), C.R.S.

³⁶ § 12-61-727(16), C.R.S.

³⁷ § 12-61-727(3)(b), C.R.S.

³⁸ § 12-61-727(3)(c), C.R.S.

³⁹ § 12-61-727(3)(d), C.R.S.

⁴⁰ § 12-61-727(3)(b), C.R.S.

BOREA is specifically tasked with establishing the education and experience requirements for certified general appraisers who submit appraisals as part of a conservation easement tax credit certificate application.⁴¹ By rule, BOREA has determined that such appraisers must complete the BOREA-designed Conservation Easement Appraiser Update Course. The certificates issued upon completion are valid until December 31 of the following calendar year.⁴²

The Division must, in consultation with the Commission, create and administer a certification program for qualified organizations that receive easements, the purpose of which is to establish minimum qualifications for certifying such organizations to encourage professionalism and stability, and to identify fraudulent or unqualified applicants to prevent them from becoming certified.⁴³

The easement holder certification program applies to:⁴⁴

- Nonprofit entities holding easements on property with conservation values consisting of recreation or education, protection of environmental systems, or preservation of open space;
- Nonprofit entities holding easements on property for historic preservation; and
- The state and any municipality, county, city and county, special district, or other political subdivision of the state that holds an easement.

In reviewing certification applications, the Division and Commission may consider:⁴⁵

- The applicant's process for reviewing, selecting and approving potential conservation easements;
- The applicant's stewardship practices and capacity, including the ability to maintain, monitor and defend the purposes of the easement;
- An audit of the applicant's financial records;
- The applicant's system of governance and ethics regarding conflicts of interest and transactions with related parties;
- Any information deemed relevant by the Division or Commission; and
- The unique circumstances of the different entities to which certification applies.

The Division must maintain an online list of the certified organizations, as well as those that have been denied, suspended or revoked.⁴⁶

All easement holder certifications expire on December 31 each year.⁴⁷

⁴¹ §§ 12-61-727(3)(b)(IV) and 12-61-704(1)(k), C.R.S.

⁴² 4 CCR 725-2(7.25). Board of Real Estate Appraisers.

⁴³ § 12-61-724(1), C.R.S.

⁴⁴ § 12-61-724(4), C.R.S.

⁴⁵ § 12-61-724(2), C.R.S.

⁴⁶ § 12-61-724(9), C.R.S.

⁴⁷ 4 CCR 725-4(2.2). Conservation Easements.

Importantly, a tax credit certificate application will not be approved by the Division if the application is based on a conservation easement donation in which the conservation easement holder is not certified by the Division at the time of the donation.⁴⁸

The statutes authorizing the certification of such organizations will sunset on July 1, 2018,⁴⁹ unless continued by the General Assembly.

Finally, the Commission is a Type 2 commission, consisting of nine members:⁵⁰

- One member representing Great Outdoors Colorado, appointed by the State Board of the Great Outdoors Colorado Trust Fund;
- One member representing the Colorado Department of Natural Resources, appointed by its Executive Director;
- One member representing the Colorado Department of Agriculture, appointed by the Commissioner of Agriculture; and
- Six members, appointed by the Governor:
 - One representing a certified land trust;
 - One representing a certified land trust or local government open space or land conservation agency;
 - One representing a certified local government open space or land conservation agency;
 - One individual who is competent and qualified to analyze the conservation purpose of conservation easements;
 - One certified general appraiser with experience in conservation easements and who satisfies any education and experience requirements established by BOREA; and
 - One landowner who has donated a conservation easement in Colorado.

All Governor appointments to the Commission are for three years,⁵¹ and the Commission must meet at least once each quarter.⁵²

The Commission is required to, among other things:

- Establish a conflict-of-interest policy;⁵³
- Advise the Division or DOR, at the request of either, regarding conservation easements for which a state income tax credit is claimed;⁵⁴
- Review conservation easement tax credit applications and requests for preliminary advisory opinions;⁵⁵ and
- Advise and make recommendations to the Director regarding the certification of conservation easement holders.⁵⁶

⁴⁸ § 12-61-724(8), C.R.S., and 4 CCR 725-4(4.1)(E). Conservation Easements.

⁴⁹ § 12-61-724(13), C.R.S.

⁵⁰ § 12-61-725(1), C.R.S.

⁵¹ § 12-61-725(2), C.R.S.

⁵² § 12-61-725(4), C.R.S.

⁵³ § 12-61-725(5), C.R.S.

⁵⁴ § 12-61-725(3)(a), C.R.S.

⁵⁵ § 12-61-725(3)(b), C.R.S.

⁵⁶ § 12-61-725(6)(a), C.R.S.

The statutes creating the Commission are scheduled to sunset on July 1, 2018,⁵⁷ unless continued by the General Assembly.

Finally, the Division is required to produce, on an annual basis, a report detailing:⁵⁸

- The total number of tax credit certificate applications received, approved and denied, along with average processing times;
- The total acreage under easement, summarized by conservation purpose;
- The total donated value of easements; and
- The total dollar amount of tax credit certificates issued.

To implement these statutory directives, the Director has promulgated rules covering a variety of topics:⁵⁹

- Definitions
- Certification of Conservation Easement Holders
- Conservation Easement Donations Made On or After January 1, 2011, but Prior to January 1, 2014
- Conservation Easement Donations Made On or After January 1, 2014
- Declaratory Orders
- Exceptions and Review of Initial Decisions by the Director or the Commission

⁵⁷ § 12-61-725(8), C.R.S.

⁵⁸ § 12-61-727(13)(a), C.R.S.

⁵⁹ 4 CCR 725-4. Conservation Easements.

Program Description and Administration

The administration of Colorado’s conservation easement tax credit certification program is primarily vested in the Director of the Division of Real Estate (Director and Division, respectively), in the Colorado Department of Regulatory Agencies. The Division primarily issues preliminary advisory opinions, issues conservation easement tax credit certificates, certifies holders of conservation easements and provides administrative support to the Conservation Easement Oversight Commission (Commission). Although many facets of the program are described in this sunset report, only the statutes creating the easement holder certification program and those creating the Commission are explicitly subject to sunset review.

Table 2 illustrates, for the fiscal years indicated, Division staff and expenditures associated with the program.

**Table 2
Staffing and Expenditures**

Fiscal Year	FTE Allocated	FTE Actual	Total Expenditures
11-12	2.8	1.75	\$144,497
12-13	2.8	2.75	\$152,291
13-14	5.3	3.75	\$190,128
14-15	5.3	3.00	\$374,352
15-16	5.3	3.75	\$506,124

Due to chronic funding shortfalls, the program has never been fully staffed.

Total staff employed in fiscal year 16-17 totaled 3.75 full-time equivalent (FTE) employees:

- Conservation Easement Program Manager (0.75 FTE Program Management I) implements and administers the tax credit certificate approval process, administers the conservation easement holder certification program, administers the tax credit cap and facilitates Commission meetings.
- Conservation Easement Examiner (1.0 FTE Compliance Specialist IV) reviews applications for tax credit certificates and preliminary advisory opinions for completeness and compliance with relevant rules and conducts conservation easement holder compliance reviews.
- Conservation Easement Appraisal Examiner (2.0 FTE Compliance Investigator II) reviews applications for tax credits and preliminary advisory opinions to determine whether the conservation easement appraisal is credible.

In addition to these FTE, the Division has periodically contracted with two individuals to review conservation easement appraisals that are submitted along with conservation easement tax credit certificate applications.

The program is entirely cash-funded through fees paid by certified conservation easement holders and applicants for preliminary advisory opinions and conservation easement tax credit certificates.

Table 3 illustrates, for the fiscal years indicated, the fees assessed by the Division in support of the program.

**Table 3
Fees by Fiscal Year⁶⁰**

Fee	FY 11-12	FY 12-13	FY 13-14	FY 14-15	FY 15-16	FY 16-17
CE Appraisal	\$265	\$420	Not Applicable	Not Applicable	Not Applicable	Not Applicable
CE Holder - Initial Certification	\$2,400	\$2,800	\$2,760	\$5,600	\$5,600	\$5,600
CE Holder - Renewal Certification	\$740	\$902	\$1,037	\$3,587	\$4,017	\$6,967
Tax Credit Certificate - No Preapproval	\$250	\$305	\$305	\$305	\$305	\$305
Tax Credit Certificate - Preapproval	Not Applicable	Not Applicable	\$4,600	\$8,300	\$10,375	\$12,350
Preliminary Advisory Opinion	Not Applicable	Not Applicable	\$2,300	\$2,300	\$2,300	\$6,175

Note the differences between fiscal years 12-13 and those that follow. House Bill 10-1197 established a limit on the total dollar amount of conservation easement tax credits available for a given year. To ensure compliance with this cap, the Division was tasked with issuing, but not reviewing for approval, conservation easement tax credit certificates. As part of the application process, the Division collected a fee, which is entitled “Tax Credit Certificate - No Preapproval”⁶¹ in Table 3. These fees are applicable to conservation easements donated in tax years 2011 through 2013 only. Given the proper circumstances, a taxpayer could amend prior year tax returns and claim a previously unclaimed tax credit up to 20 years after the donation. Thus, the Division continues to assess this fee, as applicable.

⁶⁰ Fees are budgeted based on the state’s fiscal year, but they are assessed and collected on a 12-month basis commencing in January each year.

⁶¹ Preapproval, in Colorado, indicates a process whereby the Director and the Commission must approve the tax credit before it is claimed on the taxpayer’s tax return, but after the conservation easement has actually been donated.

Similarly, the Division reviewed appraisals during this period, but the appraisal review process was relatively cursory compared to today's standards. To cover the costs of these reviews, the Division assessed a "CE Appraisal" fee. If a pre-2014 application is received today, no appraisal review is conducted and no fee is collected.

Senate Bill 13-221 created the current "preapproval" system, whereby the Division receives tax credit certificate applications and approves or denies them. As part of the application process the Division collects a fee, which is entitled "Tax Credit Certificate - Preapproval" in Table 3.

In creating the preapproval process, the General Assembly also created a process whereby conservation easement tax credit certificate applicants could obtain a preliminary advisory opinion if there were certain aspects of their easements that raised questions. The Division collects a fee along with the application for these opinions, which is entitled "Preliminary Advisory Opinion" in Table 3.

Although most tables in this report cover a span of only five years, this table provides data spanning six years to better demonstrate the steady fee increases, both from one year to the next, but also over time. In just six years, the fee paid to renew a conservation easement holder certification increased \$6,227, or 841 percent. Similarly, in just four years, the fee paid by conservation easement tax credit certificate applicants under the preapproval process increased \$7,750, or 168 percent.

Division staff attributes the substantial increase in fees for the conservation easement holder certification program to the fact that fees in the early years of the program were not established at a level sufficient to fully fund the program. Over time, fees have risen to a level that can now sustain the program.

The dramatic and steady increases in fees for the tax credit certificate program can be attributed, at least in part, to the difficulty in using fees to fund a program with no "captive" or easily predictable fee base. The tax credit certificate portion of the program is distinct from, for example, a licensing program, in that it is difficult to accurately predict the number and complexity of applications that will be received in a given year, and there are no renewals. As a result, if the number of tax credit applications is fewer than predicted in one year, the Division must increase fees in the following year to make up the shortfall and to maintain staffing. However, as fees increase, applicants begin to question the feasibility of applying for a tax credit and may opt to wait or to not apply. Thus, the spiral continues and fees continue to increase.

Conservation Easement Oversight Commission

The Commission is a nine-member body that is statutorily required to meet at least once each quarter. A review of the Commission's meetings indicates that between 2012 and 2016, the Commission met an average of 6.4 times each year. However, it met only three times in 2016.

The Commission's membership comprises:

- One member representing Great Outdoors Colorado, appointed by the State Board of the Great Outdoors Colorado Trust Fund;
- One member representing the Colorado Department of Natural Resources, appointed by its Executive Director;
- One member representing the Colorado Department of Agriculture, appointed by the Commissioner of Agriculture; and
- Six members, appointed by the Governor:
 - One representing a certified land trust;
 - One representing a certified land trust or local government open space or land conservation agency;
 - One representing a certified local government open space or land conservation agency;
 - One individual who is competent and qualified to analyze the conservation purpose of conservation easements;
 - One certified general appraiser with experience in conservation easements and who satisfies any education and experience requirements established by the Board of Real Estate Appraisers (BOREA); and
 - One landowner who has donated a conservation easement in Colorado.

The Commission has three primary tasks:

- To consult with the Division on the certification of conservation easement holders,
- To determine the validity of the conservation purpose in applications for conservation easement tax credit certificates and preliminary advisory opinions, and
- To consult with the Division and the Department of Revenue (DOR) on the validity of conservation easement appraisals presented to DOR for conservation easement tax credits claimed for donations made prior to 2014.

To assess the extent to which the Commission engages in each of these charges, staff in the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) reviewed Commission meeting minutes for calendar years 2012 through 2016.

Since 2008, the Commission has consulted with the Division regarding conservation easement holder certifications. Table 4 illustrates, for the calendar years indicated, the number of times these consultations have occurred.

Table 4
Conservation Easement Holder Certification Consultations by Calendar Year

	2012	2013	2014	2015	2016	Total
Number of Consultations	0	0	1	7	1	9

Since these consultations began, there have been few new applicants. Thus, many of the consultations referenced in Table 4 pertain to issues identified during certification renewals. This helps to explain the relatively low number of such consultations.

In 2015, five of the seven consultations pertained to compliance reviews that Division staff conducted of certified easement holders.

Since 2014, the Commission has also been tasked with determining the validity of the conservation purpose in applications for conservation easement tax credit certificates⁶² as well as in requests for preliminary advisory opinions.⁶³ While the Commission has largely delegated these duties to the Director and the Division, only the Commission can deny an application based on these grounds. As such applications are still presented to the Commission when the Director or Division has concerns. Table 5 illustrates, for the fiscal years indicated, the number of times the Commission has been consulted on these matters.

Table 5
Commission Consultations Regarding Conservation Purpose
By Calendar Year

	2012	2013	2014	2015	2016
Number of Consultations	Not Applicable	Not Applicable	6	27	7

Note the substantial increase in consultations in 2015. During this time, this process was still relatively new and Division staff had concerns about applications as staff was uncertain about how the Commission would view certain issues. Thus, more matters were referred to the Commission.

Finally, the Commission is tasked with consulting with DOR and the Division regarding those conservation easement tax credits claimed for tax years prior to 2014, when the current preapproval process was instituted. Recall that prior to 2014, taxpayers applied to the Division for a tax credit certificate, but very little review of the application was conducted prior to issuance of the certificate. Rather, DOR retained the authority to require supporting documentation when the tax credit was claimed on the taxpayer's tax return.

⁶² § 12-61-727(2)(d), C.R.S.

⁶³ § 12-61-727(14)(b), C.R.S.

As a result, the General Assembly created a system whereby DOR may consult with the Division and Commission regarding conservation easements that DOR finds questionable. Table 6 illustrates, for the calendar years indicated, the number of times DOR has requested such consultations and whether the Commission recommended that DOR accept or reject the appraisal in question.

Table 6
Commission Consultations with DOR By Calendar Year

Calendar Year	Number of Appraisals Reviewed	Number of Cases in Which Commission Recommended Rejecting the Appraisal	Number of Cases in Which Commission Recommended Accepting the Appraisal
2012	61	40	8
2013	27	Not Specified	Not Specified
2014	27	10	1
2015	14	8	3
2016	12	9	3
Total	141	67	15

Between December 2012 and May 2014, the Commission, at the request of DOR, voted on accepting or rejecting reports prepared by Division staff, rather than simply voting to either accept or reject the tax credit claim. As a result, the nature of the vote could not accurately be captured by a review of Commission meeting minutes and are, therefore, not included in the data presented in Table 6. This also explains, in part, why some figures do not seem to add up to indicated totals.

In 2015, the Commission considered three appraisals upon which it offered no recommendation.

As Table 6 indicates, the number of cases referred to the Commission by DOR has steadily declined since 2012. Staff attributes this to the fact that as DOR works through the documentation for credits claimed prior to 2014, there are fewer files to process and evaluate. Additionally, between 2008 and 2014, the Division reviewed, though not thoroughly, the appraisals submitted with the tax credit applications. As a result, fewer of these tax credit documents are problematic.

Conservation Easement Holder Certifications

In order to receive a conservation easement donation, the easement holder (the organization receiving the donation) must be certified by the Division. The entire certification application process is designed to demonstrate that the applicant has the processes, finances and capacity in place to select valid conservation easement projects that it can monitor and steward in perpetuity.

To obtain an initial conservation easement holder certification, the organization must be a governmental entity or a tax exempt charitable entity. The types of documentation that must be submitted to obtain certification vary depending on the type of organization.

First, both types of applicant must submit an organizational profile, a conservation easement project list and the prescribed fee.

The organizational profile application for a governmental entity solicits standard contact information, and such entities must submit any strategic goals, or master plans or other adopted plans for open space or an equivalent program, any locally approved open space enabling laws and the mission statement of the open space or equivalent program.

The organizational profile application for a charitable organization solicits standard contact information, and it must provide information pertaining to the number of volunteers who donate time to the organization and the number of hours donated.

Additionally, such an organization must submit a tax exempt determination letter from the Internal Revenue Service, federal tax returns, a current certificate of good standing issued by the Colorado Secretary of State, a current certificate of assumed name or trade name issued by the Colorado Secretary of State (if applicable), and the organization's bylaws and mission statement. However, if the applicant is accredited by a national land conservation organization, such as the Land Trust Accreditation Commission, proof of such accreditation may be submitted in lieu of these documentary requirements.

The project list, required of both types of entity, consists of a spreadsheet that solicits information pertaining to the date the easement was acquired, the grantor, the county in which the property is located, the number of acres under easement and the dates of any monitoring visits within the previous three years. If an easement was acquired within the previous five years, the organization must also provide the date of the baseline report, the fair market value of the easement, the name of the appraiser and the number of home sites reserved within the easement.

Once a complete organizational profile and conservation easement project list is received, Division staff selects between three and five of the listed projects for review as part of the actual application for certification.

As part of the application process, both types of applicant must complete an application and provide supplemental documentation. Topics to be addressed include:

- Conservation easement project selection, review and approval;
- Stewardship practices and capacity;
- Finances;
- Governance; and
- Any additional information the applicant would like the Division to consider.

The organization must also submit the documentation for the projects selected for review, including:

- Conservation easement deed,
- Survey maps and photographs,
- Title documentation,
- Mineral and/or water rights documentation,
- Appraisal documentation,
- Legal opinions,
- Tax opinions,
- Baseline documentation reports,
- Completed project selection criteria worksheet,
- Monitoring reports from all monitoring inspections within the previous 36 months,
- Documentation of any easement violations, and
- Documentation of the resolutions of the easement violations.

Recall that today only certified easement holders may receive donations for which a tax credit is being claimed, but not all conservation easements have an associated tax credit. Thus, projects included on an applicant's project list could include those for which a tax credit was not claimed, or for which a tax credit was claimed pursuant to one of the prior administrative processes.

The entire application process, from the time the organization submits its organizational profile until the time the Division grants or denies the application varies considerably. Since 2013, only two entities have applied for new certification. The first was initially denied two months after the submission of its application, but it was then approved within eight months after it reapplied a year later. The second entity was granted certification one year after its initial application.

Applications for new certifications, and to renew existing certifications, are submitted via an online system.

Table 7 illustrates, for the calendar years indicated, the number of new, renewed, denied, total active and conditional easement holder certifications.

Table 7
Conservation Easement Holder Certificates by Calendar Year

Calendar Year	New Certificates Issued	Certificates Renewed	Certificates Denied	Total Active Certificates	Conditional Certificates Issued
2012	1	41	0	42	1
2013	0	42	0	42	1
2014	0	41	1	41	0
2015	2	41	0	43	1
2016	0	42	0	42	1

Conditional certifications are issued to conservation easement holders that do not clearly demonstrate compliance with all of the requirements of certification, but which the Division concludes can operate, given certain safeguards or the submission of additional documentation. For example, the Division may require the conditional certificate holder to co-hold a conservation easement with a fully certified conservation easement holder, or the Division may require the conditional certificate holder to submit specific documentation that could demonstrate compliance with the certification requirements.

All conservation easement holder certifications expire annually on December 31. The certification renewal process is considerably less onerous than the process for initial certification. Certificate holders must pay a fee, submit a list of conservation easement projects and complete an application. The renewal application solicits information pertaining to any changes in governance, conservation easement activity (total number of easements held and the total acreage protected) and stewardship activities, including information pertaining to any significant violations of the easements. Finally, if the organization is accredited by a national land conservation organization, proof of such accreditation may be submitted.

Since 2014, the Division has attempted to conduct a compliance review of each certified easement holder at least once every three years. Such a review entails a more rigorous review of the easement holder's activities and a financial audit. Table 8 illustrates, for the years indicated, the number of compliance reviews conducted.

Table 8
Conservation Easement Holder Compliance Reviews
By Calendar Year

Calendar Year	Number of Reviews Completed	Number of Reviews Identifying Areas for Improvement	Number of Reviews Identifying Areas of Concern
2014	14	8	2
2015	5	4	1
2016	0	0	0

Staff attributes the decrease in the number of compliance reviews between 2014 and 2015 to staff and resource shortages. Additionally, during this time, staff endeavored to eliminate a backlog of applications for tax credit certificates.

Staff attributes the lack of compliance reviews in 2016 to several factors:

- In 2016, the Office of the State Auditor was in the process of conducting a performance audit of the conservation easement program, which required staff to shift its focus from conservation easement compliance reviews to the performance audit.
- Due to staff changes in 2016, during the first half of the year, staff worked to complete the compliance reviews from 2015.
- No reviews were conducted during the second half of the year due to staffing shortages.

Staff anticipates that five compliance reviews will be completed in 2017.

The Division received six complaints against conservation easement holders, all between 2010 and 2015. All but one of these were dismissed for lack of jurisdiction. In one instance in 2010, the Division issued an order to cease and desist from accepting conservation easements under the tax credit program without being certified by the Division.

Tax Credit Certifications

One of the program’s primary functions is to facilitate the issuance of conservation easement tax credit certificates. To obtain a certificate, a landowner seeking to secure the conservation easement tax credit must submit an application to the Division, along with supplemental documentation and the required fee.

The application solicits information pertaining to, among other things:

- The landowner,
- The property that is the subject of the conservation easement,
- The desired amount of the tax credit certificate, and
- A series of declarations indicating the applicant’s understanding of the process.

Supplemental documentation includes:

- Recorded deed of conservation easement,
- Baseline documentation report,
- Mineral assessment report, and
- Final conservation easement appraisal.

Table 9 illustrates, for the calendar years indicated, the number of tax credit applications received, approved and denied. To be reported as an application received, it must have been deemed complete in the indicated year.

Table 9
Tax Credit Certificate Applications Received by Calendar Year

	2012	2013	2014	2015	2016
Pre-2014 Applications Received	83	72	36	1	0
Post-2014 Applications Received	Not Applicable	Not Applicable	35	28	35
Total Applications Received	83	72	71	29	35

Note that prior to 2014, the Division issued tax credit certificates, but did not conduct the type of comprehensive review that is performed today. Complicating matters is the fact that a landowner may apply for a tax credit certificate, under either scenario, years after the conservation easement was donated. To distinguish between the two types of certification processes, several of the following tables refer to “Pre-2014 Applications” and “Post-2014 Applications”.

Regardless of the type of application submitted, the number of tax credit applications received by the Division steadily decreased during the reporting period.

Recall that a conservation easement donation for which a tax credit is claimed must serve an articulated conservation purpose. Table 10 illustrates, for calendar years 2014 through 2016, the number of tax credit applications submitted for the indicated conservation purpose. Prior to 2014, the Division did not review tax credit applications in sufficient detail to report the conservation purposes of tax credits applied for.

Figures in Table 10 below vary from those in Table 9 above because a single conservation easement may have multiple conservation purposes.

Table 10
Conservation Purposes of Tax Credit Certificate Applications Received
By Calendar Year

	2014	2015	2016
Outdoor Recreation/Education	1	3	0
Relatively Natural Habitat	35	27	31
Open Space/Scenic	33	24	28
Open Space/Agriculture	27	24	28
Historic	0	0	0

While applications claiming historic and outdoor recreation/education conservation purposes are quite rare, there is a nearly equal division among the remaining categories.

Once an application is deemed complete, it is reviewed by Division staff. To help expedite the review process, the Division has developed two checklists, one entitled “Appraisal Report Summary” and the other entitled “Conservation Purpose Compliance Checklist.” The checklists also allow staff to indicate any unique circumstances or issues associated with the application or supporting documents.

Table 11 illustrates, by calendar year, the number of tax credit applications approved.

Table 11
Tax Credit Applications Approved by Calendar Year

	2012	2013	2014	2015	2016
Pre-2014 Applications Approved	88	71	37	1	0
Post-2014 Applications Approved	Not Applicable	Not Applicable	12	32	23
Total Applications Approved	88	71	49	33	23

Throughout the reporting period, the Director denied a single tax credit application, which was ultimately settled and issued in January 2017.

The number of applications approved in a given year varies from the number of applications received due to the fact that applications received in any particular year may not be approved in that same year. The statute contains a series of deadlines that must be complied with once an application is deemed complete. One of the more important of these is the one that requires the Director to approve or serve notice of deficiency within an average of 120 days of deeming an application complete. Since this deadline was imposed in 2014, the Director has met it only once, averaging 37 days in 2014, 128 days in 2015 and 136 days in 2016.

A tax credit may be issued for 75 percent of the first \$100,000 of the fair market value of the donated conservation easement, and 50 percent of all amounts in excess of \$100,000, not to exceed \$1.5 million. Additionally, the total of all tax credits issued in a single year may not exceed \$45 million.

Table 12 illustrates, for the years indicated, the annual statutory cap and the value of tax credits issued as of August 8, 2017.

Table 12
Total Value of Conservation Easement Tax Credits Permitted and Issued
By Cap Year⁶⁴

Calendar Year	Total Annual Tax Credit Cap	Total Value of Tax Credits Issued
2011	\$22,000,000	\$22,000,000
2012	\$22,000,000	\$22,000,000
2013	\$34,000,000	\$28,240,269
2014	\$45,000,000	\$11,859,014
2015	\$45,000,000	\$17,169,009
2016	\$45,000,000	\$7,998,082
2017	\$45,000,000	\$477,500

The value of the tax credits issued for each year after 2012 is subject to change as applications for those years continue to be submitted and approved.

Note the spike in tax credits issued in 2013, the year in which the annual cap increased from \$22 million to \$34 million. Note also the relative decrease in tax credits issued beginning in 2014, the year in which the preapproval process began. There is no shortage of theories as to why this decline has occurred, but two of the more prominent assert:

- There are fewer conservation opportunities; thus, there are fewer applications.
- The tax credit application processing has become too onerous, lengthy and expensive; thus, there are fewer applications.

Applications for conservation easement tax credits are submitted via an online system.

⁶⁴ *Conservation Easement Tax Credit Cap*. Colorado Division of Real Estate. Retrieved on August 16, 2017, from <https://docs.google.com/spreadsheets/d/1Lmx8omQEmok1DJ7UvW6aipThJQCIOvt0GNNINjYPMmM/pubhtml>

Preliminary Advisory Opinions

Recognizing the costly and lengthy process of applying for a tax credit certificate, and the possible uncertainty involved with unique situations, the General Assembly, in 2014, created the preliminary advisory opinion process. This process was ostensibly created for those conservation easements regarding which there is a question pertaining to the conservation purpose or the appraisal. The preliminary advisory opinion application requires the applicant to select the purpose for which the opinion is being sought.

The preliminary advisory opinion application solicits much of the same information and documentation (though drafts are generally acceptable) as does the application for a tax credit certificate. An application seeking a preliminary advisory opinion must be accompanied by the required fee.

Table 13 illustrates, for the calendar years indicated, the number of preliminary advisory opinion applications received, deemed complete and the number of such opinions issued.

Table 13
Preliminary Advisory Opinion Applications: General Information
By Calendar Year

	2014	2015	2016	Total
Total Number of Applications Received	35	32	32	99
Total Number of Applications Deemed Complete	26	32	32	90
Total Number of Preliminary Advisory Opinions Issued	23	14	26	63

Note the gap between the number of applications deemed complete and the number of preliminary advisory opinions issued in 2015 and 2016. Division staff attributes this to a variety of issues. In at least one situation, an applicant opted to abandon its application for a preliminary advisory opinion to pursue a tax credit certificate at the end of the calendar year. In yet another instance, the appraiser on the project resigned. Additionally, not all supplemental documentation had been received by the end of the calendar year, resulting in delays. Finally, processing delays also explain this situation.

Table 14 illustrates, for the calendar years indicated, the results of the preliminary advisory opinions seeking clarification on appraisal issues.

Table 14
Preliminary Advisory Opinion Applications: Appraisal
By Calendar Year

	2014	2015	2016	Total
Number of Applications Deemed Complete	11	23	30	64
Positive Preliminary Advisory Opinions	11	12	12	35
Negative Preliminary Advisory Opinions	0	11	15	24

As of this writing, the preliminary advisory opinions requested by 25 of the 30 applications submitted in 2016 have been issued, three were withdrawn and the remaining two remain open pending submission of additional information.

A positive opinion is an indication that the approving entity finds the application acceptable, but is not a guaranty that it will ultimately be approved when submitted for a tax credit certificate.

A negative opinion is an indication that the approving entity finds the application problematic.

As Table 14 illustrates, of the 32 complete applications in 2016, 30 pertained to appraisals. In contrast, Table 15, below, demonstrates that in that same year, only two preliminary advisory opinions were sought to clarify an issue pertaining to conservation purpose.

Table 15
Preliminary Advisory Opinion Applications: Conservation Purpose
By Calendar Year

	2014	2015	2016	Total
Number of Applications Deemed Complete	15	5	2	22
Positive Preliminary Advisory Opinions	15	5	2	22
Negative Preliminary Advisory Opinions	0	0	0	0

Just as many stakeholders complain about the lengthy application processing times associated with the issuance of tax credit certificates, the same holds true for preliminary advisory opinions. Table 16 illustrates, for the calendar years indicated, the average number of days it took the Division to process applications for preliminary advisory opinions.

Table 16
Preliminary Advisory Opinion Applications
Average Processing Times in Days
By Calendar Year

	2014	2015	2016
Conservation Purpose	45	97	141
Appraisal	47	155	222
Overall Average	46	134	219

Although statute does not dictate that preliminary advisory opinions be issued within 120 days of receipt, as it does for tax credit certificate applications, the Division had established such a goal in rule. This rule was repealed in the summer of 2017. However, these delays explain, at least in part, why figures in Tables 13, 14 and 15 do not add up.

Applications for preliminary advisory opinions are submitted via an online system.

Collateral Consequences – Criminal Convictions

Section 24-34-104(6)(b)(IX), Colorado Revised Statutes, requires COPRRR to determine whether the agency under review, through its licensing processes, imposes any disqualifications on applicants or registrants based on past criminal history, and if so, whether the disqualifications serve public safety or commercial or consumer protection interests.

The Division lacks the statutory authority to impose any such disqualifications on any applicants or to revoke or suspend any certificate based on such grounds.

Analysis and Recommendations

Recommendation 1 – Continue the certification of conservation easement holders for seven years, until 2025.

To claim a conservation easement tax credit in Colorado, the conservation easement must, among other things, be donated to a certified governmental entity or a charitable organization.⁶⁵ Charitable organizations and governmental entities holding such easements are often referred to as conservation easement holders and include land trusts, local governments and state agencies.

Colorado began granting tax credits for conservation easement donations in 2000. In these early years, state oversight consisted of Department of Revenue (DOR) reviews of tax returns after the donations were made and the tax credits claimed. In the years that followed, the number of easements donated, and the value of the tax credits claimed increased dramatically.⁶⁶ Abuse of the system became apparent. The blame was directed at allegedly inflated appraisals and allegedly fraudulent conservation easement holders.

To address the problems presented by conservation easement holders, Colorado began requiring conservation easement holders that receive donations claiming a tax credit to be certified by the Division of Real Estate (Division). The stated purposes of the certification program are to establish minimum qualifications to encourage professionalism and stability and to identify fraudulent or unqualified applicants to prevent them from receiving conservation easements claiming a tax credit.⁶⁷

To obtain and maintain a certification, a conservation easement holder must provide to the Division documentation pertaining to the easement holder's:

- Conservation easement project selection, review and approval processes;
- Stewardship practices and capacity;
- Finances;
- Governance; and
- Any additional information the applicant would like the Division to consider.

Certifications are renewed annually and the Division attempts to conduct a deeper compliance review of easement holders every three years, all in an attempt to ensure that easement holders are legitimate and possesses the capacity to select and monitor their easements in perpetuity.

⁶⁵ § 39-22-522(2)(b), C.R.S.

⁶⁶ See A. Seidl, et al, *Investing in Colorado—Colorado's Return on Investments in Conservation Easements: Conservation Easement Tax Credit Program and Great Outdoors Colorado*, Colorado State University, 2017, p. 17.

⁶⁷ § 12-61-724(1), C.R.S.

As part of this sunset review, staff in the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) conducted a survey of landowners who had donated a conservation easement and received a tax credit. Seventy-five percent of respondents indicated that state certification of the easement holder was either slightly important (20 percent) or very important (55 percent) to them. Thus, state certification seems to assure potential donors of the legitimacy of the organization to which they donate their easements.

While many criticize various aspects of Colorado's conservation easement tax credit program, most agree that the certification of conservation easement holders has successfully regulated most, if not all, of the fraud out of the conservation easement system. Yet vigilance remains necessary to protect the public welfare and to prevent a return to the days when fraud was more frequently committed.

In 2017, the Brookings Institution released a study of conservation easement tax deductions at the federal level, finding,

the largest recipient of donations of easements by dollar value over the period from 2011 to 2013 was Foothills Land Conservancy of Maryville, TN. The organization reported having four employees and spending \$19,000 to monitor the 19,600 acres of easements it maintains in five states. Foothills received 14 contributions of easements valued at \$236.7 million (about \$17 million each) in 2013. [] By contrast, the second largest recipient of donations of easements was the Nature Conservancy, which maintains almost 2.9 million acres, has 3,725 employees, and spends more than a million dollars each year maintaining and enforcing their easements. According to their [Internal Revenue Service] return for 2011, it received 76 easements valued at \$95 million total.⁶⁸

This seemingly casts doubt on Foothills Land Conservancy's ability to adequately monitor the conservation easements it holds. The study's recommended solution to this problem is to establish certain minimum qualifications for conservation easement holders, something that does not exist at the federal level. Specifically, the study recommends that such qualifications include reviewing,

the processes by which organizations select, review, and approve conservation easements; the management of organizations' conservation easements; and the organizations' finances and governance.⁶⁹

In short, the Brookings Institution has indirectly endorsed the process employed in Colorado as a best practice to be replicated by other states and the federal government.

For all these reasons, the General Assembly should continue the statutory authority to certify conservation easement holders for seven years, until 2025. Since conservation easements are granted in perpetuity, and must be monitored in perpetuity, seven years is an appropriate amount of time to continue this statutory authority.

⁶⁸ A. Looney, "Charitable Contributions of Conservation Easements," The Brookings Institution (May 2017), p. 5.

⁶⁹ A. Looney, "Charitable Contributions of Conservation Easements," The Brookings Institution (May 2017), p. 34.

Recommendation 2 – Continue the Conservation Easement Oversight Commission for seven years, until 2025.

The Conservation Easement Oversight Commission (Commission) is a nine member, Type 2 commission⁷⁰ with three primary tasks:

- To consult with the Division on the certification of conservation easement holders,
- To determine the validity of the conservation purpose in applications for conservation easement tax credit certificates and preliminary advisory opinions, and
- To consult with the Division and the Department of Revenue (DOR) on the validity of conservation easement appraisals presented to DOR for conservation easement tax credits claimed for donations made prior to 2014.

The primacy of the last of these tasks will begin to fade by the end of 2018. Recall that DOR can look back four years when reviewing tax returns and, more importantly, DOR can disallow tax credits claimed for conservation easement donations made prior to 2014. Thus, 2018 is a pivotal year.

Yet, even beyond 2018, DOR may have occasion to consult with the Commission. Since taxpayers can amend prior years' tax returns, it is possible that a taxpayer who donated a conservation easement in 2013, for example, may wait several years to actually claim it. As a result, DOR may still require the Commission's expertise in this area.

Regardless, the Commission's expertise is still needed to determine whether conservation easement donations satisfy a qualified conservation purpose. Additionally, Recommendation 1 continues the conservation easement holder certification program and the Commission plays a role in that process by helping to ensure fraud does not recur. Thus, continuation of the Commission is justified.

Additionally, this sunset report makes recommendations that, if adopted, will add to the Commission's workload, thereby necessitating its continuation.

For all these reasons, and so that the next sunset review of the Commission coincides with the next sunset review of the conservation easement holder certification program, the General Assembly should continue the Commission for seven years, until 2025.

⁷⁰ § 12-61-725(1), C.R.S.

Recommendation 3 – Alter the size and composition of the Commission, effective July 1, 2019, to comprise seven members.

Currently, the Commission comprises nine members:⁷¹

- One member representing Great Outdoors Colorado (GOCO), appointed by the State Board of the Great Outdoors Colorado Trust Fund;
- One member representing the Colorado Department of Natural Resources (DNR), appointed by its Executive Director;
- One member representing the Colorado Department of Agriculture (CDA), appointed by the Commissioner of Agriculture; and
- Six members, appointed by the Governor:
 - One representing a certified land trust;
 - One representing a certified land trust or local government open space or land conservation agency;
 - One representing a certified local government open space or land conservation agency;
 - One individual who is competent and qualified to analyze the conservation purpose of conservation easements;
 - One certified general appraiser with experience in conservation easements and who satisfies any education and experience requirements established by the Board of Real Estate Appraisers (BOREA); and
 - One landowner who has donated a conservation easement in Colorado.

The Commission has three primary tasks:

- To consult with the Division on the certification of conservation easement holders,
- To determine the validity of the conservation purpose in applications for conservation easement tax credit certificates and preliminary advisory opinions, and
- To consult with the Division and DOR on the validity of conservation easement appraisals presented to DOR for conservation easement tax credits claimed for donations made prior to 2014.

While the first two of these tasks are likely to remain necessary for the foreseeable future, the third is more uncertain. As the need for DOR consultations with the Commission declines, due to the DOR's four-year look back limitation, it becomes reasonable to question whether the composition of the Commission remains appropriate. During DOR consultations, it is not uncommon for the appraisal to be the main topic of discussion. As such, the expertise of an appraiser and the various types of conservation easement holders has been invaluable. But as this role diminishes, it is reasonable to conclude that the need for such expertise, too, will diminish.

⁷¹ § 12-61-725(1), C.R.S.

Additionally, individual Commission members often recuse themselves from Commission discussions due to conflicts of interest. With only 40 certified conservation easement holders in 2017, this community is relatively small; as a result, it is not uncommon for the Commission to consider a tax credit application, preliminary advisory opinion application, a conservation easement certification issue or a DOR consultation matter in which a Commission member has an interest, or in which a friend or close associate of a Commission member has an interest.

Between 2012 and 2016, the Commission met 32 times. At 19 of those meetings, at least one Commission member recused himself or herself, or abstained from a vote, mostly due to having a conflict of interest. Indeed, during this period, there were a total of 110 recusals or abstentions. Three individuals were responsible for 47 of these: one appraiser and two representatives of certified easement holders.

While Commission members should be commended for recusing themselves when necessary, it is unfortunate that they are placed in the position of having to do so. Additionally, there is very little public representation on the Commission.

The current seat for a landowner who has donated a conservation easement certainly brings a level of public representation, but is unnecessarily restrictive. Additionally, that individual's personal experience with a particular appraiser, conservation easement holder or other party could create a conflict of interest and has, on at least one occasion.

Ostensibly, the representatives of DNR and CDA represent the public, but those two departments also have fairly well-defined constituencies, and DNR, through Colorado Parks and Wildlife (CPW) is itself a conservation easement holder. The representative of GOCO is in a similar position. While GOCO does not hold easements, it frequently funds portions of conservation easement transactions, creating the likelihood of a conflict.

While the interests of the current easement holder representatives on the Commission may vary, the expertise necessary for Commission discussions and deliberations is not as nuanced. Thus, two representatives should be sufficient. Additionally, DNR, through CPW, also holds conservation easements, so that level of expertise remains.

Once the Commission's consultations with DOR lose their primacy, the role of the qualified appraiser is less clear. Since those consultations may last at least into 2019, any changes to the Commission's size or composition should be delayed until July 1, 2019.

Finally, greater public participation, via Commission members representing the general public, in the certification of easement holders and the evaluation of the conservation purposes of conservation easements is likely to lead to greater transparency without sacrificing public protection.

Therefore, to limit the number of conflicts of interest and to bring greater public representation and transparency to the Commission, the General Assembly should alter the size and composition of the Commission to include:

- One representative of DNR, appointed by its Executive Director;
- One representative of CDA, appointed by the Commissioner of Agriculture;
- Five members, appointed by the Governor:
 - Two representatives of certified easement holders;
 - One individual who is competent and qualified to analyze the conservation purpose of conservation easements; and
 - Two members of the general public.

Recommendation 4 – Authorize the Division Director to share conservation easement information with a third party vendor for the purpose of developing a registry of conservation easements that receive tax credits, and direct the Director to consult with the Commission on the types of information that should be reported into the registry.

This sunset report is relatively narrow in scope. Among the issues that are beyond its scope is the existence of the conservation easement tax credit itself. While this is, fundamentally, a matter of tax policy that clearly falls within the domain of the General Assembly, many have asked what the state and taxpayers have received in return for the tax credits issued.

Indeed,

A state-wide system of recording easements is an important prerequisite to the continued enforcement of the conditions of those easements, both through the continuing awareness of the restrictions and knowledge of the organization responsible for monitoring the easement. An argument can also be made for public knowledge of the parcels that have been publicly subsidized, whether through a purchase by a government agency, a donation to a charitable organization, or a purchase by a charitable organization using funds that created tax deductions for the donors. Owners of neighboring parcels would also benefit from knowing the existence of easements in their area, since such easements frequently result in higher property values for nearby parcels.⁷²

The Division and the Commission are in the unique position of being able to gather some of the data necessary to answer this question. As the entities that receive and approve tax credit certification applications and that oversee the conservation easement holders, they possess or have access to information as to the locations, sizes and conservation purposes of all conservation easements for which a tax credit is sought.

⁷² J. Sundberg, “State Income Tax Credits for Conservation Easements: Do Additional Credits Create Additional Value?”, Lincoln Institute of Land Policy (Working Paper), 2011, p. 4.

Yet, as the State Auditor pointed out in a 2016 performance audit,

no single state agency is charged with tracking and reporting on the specific benefits the state receives from the program in return for its investment in forgone tax revenue.⁷³

The State Auditor went on to recommend that the Division seek statutory authority to gather and report such information. While this recommendation has merit, even if the Division tracked such information, it is unclear whether it could be reported, since statute dictates that documents and records related to an application for a tax credit certificate or preliminary advisory opinion are not subject to the Colorado Open Records Act and are not subject to public inspection.⁷⁴ Thus, both prongs of the recommendation appear necessary.

Clearly, some taxpayer information should remain confidential (Social Security numbers, for example), but much of the information pertaining to conservation easements is currently a matter of public record (i.e., the conservation easement deed itself is recorded with the county in which the property is located), even if it is not readily obtainable. To better ascertain which aspects of a conservation easement might help future policy makers continue or improve the tax credit program, the Division should consult with the Commission in developing these data points and how best to collect them since not all conservation easement holders have equivalent resources. For example, as part of this sunset review, COPRRR conducted a survey of certified conservation easement holders and learned that 9.1 percent of respondents do not have Geographic Information System⁷⁵ or Shapefile⁷⁶ information pertaining to the easements they hold. These are one type of data that many believe is necessary to build an accurate map of Colorado's conservation easements.

Finally, the Division and Commission need not start from nothing. Colorado State University, for example, houses the Colorado Natural Heritage Program's Colorado Ownership, Management, and Protection (COMaP) service, which currently possesses a considerable amount of data along these lines. The Division and Commission should partner with COMaP or another similar organization to build and maintain the registry envisioned by this recommendation.

Further, by identifying and tracking the existence and location of conservation easements, the State might more readily identify those conservation easements that are no longer being monitored. These are often referred to as "orphan easements," and there is concern that there is a growing number of them.

⁷³ Colorado Office of the State Auditor, *Performance Audit: Department of Regulatory Agencies, Division of Real Estate Conservation Easement Tax Credit Program, After Changes in 2014*, November 2016, p. 79.

⁷⁴ § 12-61-727(16), C.R.S.

⁷⁵ A Geographic Information System (GIS) is a system designed to capture, store, manipulate, analyze, manage and present spatial or geographic data.

⁷⁶ A "Shapefile" is a file format (like .pdf or .doc) that can spatially describe vector features: points, lines, and polygons, representing things like water wells, rivers and lakes or conservation easements.

As of this writing, taxpayers have paid landowners approximately \$1 billion in conservation easement tax credits for over 4,200 conservation easement donations on more than 1.7 million acres,⁷⁷ yet no single entity maintains a record of where those easements are located or what they purport to protect. Thus, it is impossible to determine whether the tax credit certificate program serves to protect the public.

Because landowners have historically enjoyed a degree of confidentiality with respect to their easement donations, this Recommendation 4 should be implemented on a going-forward basis, commencing on January 1, 2019.

To better ascertain the extent to which conservation easement tax credits are benefiting the State of Colorado and its citizens, the General Assembly should direct the Director and Commission to consult on what data should be reported, and authorize the Director to report such information to a third party that will make it available to the public.

Recommendation 5 – Authorize the Director to establish, by rule and after consultation with the Commission, monthly caps on the number of applications for tax credit certificates and preliminary advisory opinions that will be accepted by the Division, to more evenly distribute the Division’s workload throughout the year.

Statute requires the Division to either approve a tax credit certificate application or notify the landowner of any deficiencies in the application within an average of 120 days of having received the application.⁷⁸ Since this deadline was imposed in 2014, the Director has met it only once, averaging 37 days in 2014, 128 days in 2015 and 136 days in 2016.

To be sure, a number of factors impact processing delays, one of which is the timing of when applications are received.

Table 17 illustrates, for the calendar years indicated, the number of tax credit certificate and preliminary advisory opinion applications received each month.

⁷⁷ Colorado Office of the State Auditor, *Performance Audit: Department of Regulatory Agencies, Division of Real Estate Conservation Easement Tax Credit Program, After Changes in 2014*, November 2016, p. 1.

⁷⁸ §§ 12-61-727(7)(a) and 12-61-727(10), C.R.S.

Table 17
Total Number of Tax Credit and Preliminary Advisory Opinion Applications Received, by Month and Calendar Year

Month	2012	2013	2014	2015	2016	Total
January	12	10	11	5	3	41
February	11	3	13	3	4	34
March	5	4	12	4	3	28
April	8	6	2	3	3	22
May	8	8	2	4	2	24
June	5	3	4	5	8	25
July	18	3	1	4	6	32
August	10	3	7	5	3	28
September	1	3	10	7	3	24
October	4	9	6	6	10	35
November	0	3	8	2	2	15
December	1	17	21	13	19	71

Table 17 clearly establishes that the Division receives more applications in December than in any other month. Moreover, over the five-year period, 45 percent of applications are received in just 33 percent of the year (December through March). At least two explanations are plausible.

First, the Division typically announces fees for the upcoming year in late December. Since fees have historically increased each year, landowners have an incentive to apply in December, before the fee increases in January.

Second, to claim a conservation easement tax credit, the deed of conservation easement must first be recorded with the clerk of the county in which the property is located by December 31 of the year of the donation. Thus, the landowner has the added incentive of applying for the tax credit in the year of donation so as to increase the chances of the tax credit certificate application being approved in time to file tax returns for the year of donation without having to amend that year's tax returns months later. In short, tax filing deadlines likely play a role as well.

One solution to this problem is to cap the number of applications the Division can accept on a monthly basis. This would incentivize landowners to file their tax credit applications as soon as possible so as to increase the likelihood of receiving the tax credit certificate in time to file their tax returns the following year.

So as not to inadvertently cap the number of tax credit certificates issued, the General Assembly should authorize the Division to establish this cap by rule, so that it can be adjusted as needed. Further, this mechanism should be discretionary, rather than mandatory, so as to mitigate any unintended consequences.

Administrative Recommendation 1 – The Commission and Division should require certified easement holders to develop plans addressing their own dissolution or inability to monitor their conservation easements.

A popular topic of discussion throughout this sunset review involved orphan easements. These are easements that have, for all practical purposes, been abandoned. That is, they are no longer being monitored for compliance with the terms of the easement.

The reasons for this vary, but one typical scenario involves the dissolution of the conservation easement holder and no transfer of the easements to another organization. The conservation easement remains tied to the land, but with no one enforcing the terms of the easement, it is considered orphaned.

While the dilemma of how to address orphan easements is well beyond the scope of this sunset report, and indeed, well beyond the Division’s administration of the conservation easement program, mitigating their creation is possible.

One of the stated goals of the conservation easement holder certification process is to establish standards that encourage professionalism and stability.⁷⁹ Arguably, orphan easements are, at least in part, the result of unstable easement holders.

As part of this sunset review, COPRRR conducted a survey of certified easement holders. When asked about the adequacy of their funding to monitor and defend the easements they hold, 13.6 percent of respondents indicated inadequate funding (although 14.3 percent also have insurance to assist with such endeavors). Similarly, when asked about the likelihood of their respective organizations existing in 10 years, 9.1 percent of respondents indicated that this is only somewhat likely. Thus, while most conservation easement holders are probably safe from failure, not all are.

When asked whether they have contingency plans to monitor and defend their easements in the event they are unable to do so, 22.7 percent of respondents indicated that they do not.

As part of the conservation easement holder certification process, applicants are required to submit various documents evidencing their monitoring and stewarding practices, as well as financial information, all in an attempt to demonstrate their ability and intention of monitoring their easements in perpetuity.

In developing the standards for easement holder certification, the General Assembly has given the Division and Commission wide latitude by enumerating some certification requirements, but also by requiring “any other information deemed relevant by the Division or the Commission.”⁸⁰

⁷⁹ § 12-61-724(1)(a), C.R.S.

⁸⁰ § 12-61-724(2)(e), C.R.S.

Therefore, the Division and Commission should amend the certification requirements to require certified conservation easement holders to develop plans to ensure the continued monitoring and stewardship of their easements in the event they dissolve or are otherwise unable to continue their monitoring responsibilities.

Appendix A - Survey of Landowners

In June 2017, a link to the survey was sent via email to 100 landowners who donated a conservation easement and received a conservation easement tax credit between January 2014 and May 2017. This encompasses all of such landowners for whom the Division was able to provide email addresses. Of these, an estimated 94 were successfully delivered and 20 individuals responded. This represents a response rate of 21.2 percent.

Some free text responses have been edited for presentability.

1. In what year did you donate your most recent conservation easement?

2014	4	20%
2015	8	40%
2016	6	30%
2017	2	10%

2. How did you learn of the conservation easement tax credit program? (select all that apply)

Friends/neighbors	11	55%
Media	2	10%
I was approached by a land trust	4	20%
I was approached by a tax credit broker	1	5%
My tax advisor suggested it	1	5%
My attorney suggested it	3	15%
Realtor	1	5%
I attended a reception to bring awareness to the benefits open space in Durango, CO	1	5%
Colorado Headwaters Land Trust was recommended by a friend who also created a land trust	1	5%

3. Which of the following factors was the most important in reaching your decision to donate your conservation easement?

To keep the land in our family	1	5%
To protect/conserve our land as it is today	10	50%
To protect the habitat for a particular species	1	5%
To realize the tax benefits (federal deduction and state tax credit) of the donation for my own use	3	15%
To sell the tax credits to raise cash	4	20%
All were equal considerations	1	5%

4. Have you sold or otherwise transferred any portion of your tax credits?

Yes	9	45%
No, and I have no plans to	3	15%
No, but I plan to	8	40%

5. If you sold or otherwise transferred your tax credits, approximately what portion did you retain for your own use?

Less than 10%	6	30%
11-25%	3	15%
26-50%	2	10%
51-75%	1	5%
76-99%	0	
I have not sold or otherwise transferred my tax credits	8	40%

6. If you sold or otherwise transferred your tax credits, did you utilize the services of a tax credit broker?

Yes	10	50%
No	1	5%
I have not sold or otherwise transferred my tax credits	9	45%

7. In selecting the land trust to which you donated your conservation easement, how important was the fact that the land trust is certified by the State of Colorado?

Completely unimportant	1	5%
Slightly unimportant	0	0%
Neither important nor unimportant	4	20%
Slightly important	4	20%
Very important	11	55%

8. Which of the following factors was the most important in deciding which land trust to donate your conservation easement?

The regional focus of the land trust	9	45%
The land trust specializes in protecting open space/wilderness areas	0	0%
The land trust specializes in protecting habitat for a particular species	1	5%
The land trust specializes in protecting agricultural/ranch land	6	30%
The land trust was able to purchase (either directly or indirectly) a portion of the conservation easement	1	5%
The land trust was certified by the State of Colorado	1	5%
personal knowledge of the principals	1	5%
They were local and the first I learned about	1	5%

9. Did you seek a preliminary advisory opinion (PAO) during the course of your conservation easement donation and tax credit application process?

Yes	13	65%
No	7	35%

10. Why did you seek a preliminary advisory opinion? (select all that apply)

We did not seek a preliminary advisory opinion	7	35%
Our donation was unique, so we sought guidance on how best to proceed	1	5%
Our appraiser insisted that we do so	2	10%
Our appraiser suggested that we do so	2	10%
The land trust insisted that we do so	2	10%
The land trust suggested that we do so	3	15%
The tax credit broker insisted that we do so	1	5%
The tax credit broker suggested that we do so	3	15%
[M]y attorney suggested we do so	1	5%
[T]he attorney suggested it	1	5%
We thought it would facilitate the issuance of the tax credits	1	5%
My Atty. and [Accountant]	1	5%
To help streamline the process and [peace] of mind that it would be successful.	1	5%

11. For what purpose did you seek a preliminary advisory opinion?

To address the appraisal	12	60%
To address the conservation purpose	3	15%
I do not know	5	25%

12. Overall, how would you characterize your experience in obtaining a conservation easement tax credit?

Very negative	10	50%
Somewhat negative	4	20%
Neutral	0	0%
Somewhat positive	2	10%
Very positive	4	20%

13. Would you consider seeking a conservation easement tax credit again, if possible?

Yes	10	50%
No	10	50%

14. If you would not consider seeking a conservation easement tax credit again, please indicate the main reason why?

I would consider seeking a conservation easement tax credit again	5	25%
The process was too difficult	4	20%
The process was too expensive	1	5%
The perpetual nature of the conservation easement is too burdensome	0	0
The process has become too difficult and too expensive. Additionally, the time it takes to get an approval is excessive.	1	5%
[] bureaucrats	1	5%

I would consider seeking a CE tax credit again, however I think it unlikely the situation would present itself again.	1	5%
[T]oo costly a process and no ability to offset the expenses	1	5%
While we could consider it the process took much too long, the required donation under GOCO is an impediment to getting more land conserved. CO has a good Con Ease program but the donation and tax credit portion need to be made simpler and faster.	1	5%
Could be done in a more timely matter.	1	5%
[D]ealing with the slow [burdensome . . .] governmental bureaucracy	1	5%
I have other smaller tracts of land that I purchased with the sale of my tax credit that I would like to conserve (because I really believe in the program) but it is too expensive and difficult to conserve a small parcel of land.	1	5%
The process was encumbered by a back log of requests, the review panel inappropriately questioned professional data by my highly qualified appraiser. My application took 1-1/2 years for a basic easement. It is an expensive process to be subjected by inexperienced personnel. People unfamiliar with Conservation easements need to trust those who are in the know.	1	5%
I would if the process was faster. [One employee] was great! Keep the program [given] Colorado's growth.	1	5%

Appendix B - Survey of Qualified Appraisers

In June 2017, a link to the survey was sent via email to the 14 appraisers who had completed the Conservation Easement Appraiser Update Course as of May 31, 2017, as well as seven additional appraisers known to work on conservation easements but who had not yet completed the course. All 21 of these emails were successfully delivered and 6 individuals responded. This represents a response rate of 28.6 percent.

1. Have you ever accepted/completed an appraisal assignment involving a conservation easement in Colorado?

Yes	6	100%
No	0	0%

2. Have you ever accepted/completed an appraisal assignment involving a conservation easement in another state?

Yes	2	33.3%
No	4	66.7%

3. Approximately how many conservation easement appraisals have you completed in Colorado in the last five years?

None	0	0%
1-5	0	0%
6-10	1	16.7%
11-15	1	16.7%
16-20	0	0%
More than 20	4	66.7%

4. Please indicate which of the following conservation easement appraisal courses you have completed (check all that apply)

Valuation of Conservation Easements and Other Partial Interests in Real Estate, sponsored by the American Society of Farm Managers and Rural Appraisers.	4	66.7%
Valuation of Conservation Easements, sponsored by the Appraisal Institute.	4	66.7%
Conservation Easement Appraiser Update Course, sponsored by the Colorado Board of Real Estate Appraisers	6	100%
Internal Revenue Courses related to the valuation of Conservation Easements and other partial interests	1	16.7%

5. For how much longer do you plan on performing conservation easement appraisals?

I do not plan on doing any more conservation easement appraisals	3	50%
1-2 years	0	0%
3-5 years	0	0%

6-10 years	0	0%
At least 10 more years	3	50%

6. Will you accept a Colorado conservation easement assignment without also requiring a preliminary advisory opinion?

Yes	4	66.7%
No	2	33.3%

7. If not, please select the main reason.

The added certainty benefits the parties to the transaction	0	0%
The added certainty benefits me, professionally	2	33.3%
I do not require a preliminary advisory opinion	4	66.7%

8. In general, how would you best characterize your interactions with staff at the Division of Real Estate prior to December 2016?

I had no interaction with staff because I did not work on any conservation easements prior to this date	0	0%
Staff was unhelpful	4	66.7%
Staff was helpful	2	33.3%

9. In general, how would you best characterize your interactions with staff at the Division of Real Estate since January 2017?

I had no interaction with staff because I did not work on any conservation easements after to this date	0	0%
Staff was unhelpful	0	0%
Staff was helpful	6	100%

10. In general, how would you characterize the Division of Real Estate's level of scrutiny during the appraisal review process prior to December 2016?

Too rigorous	6	100%
About right	0	0%
Not rigorous enough	0	0%

11. In general, how would you characterize the Division of Real Estate's level of scrutiny during the appraisal review process since January 2017?

Too rigorous	2	33.3%
About right	4	66.7%
Not rigorous enough	0	0%

Appendix C - Survey of Certified General Appraisers

In June 2017, a link to the survey was sent via email to the 971 certified general appraisers who had not completed the Conservation Easement Appraiser Update Course as of May 31, 2017. Of these, an estimated 942 were successfully delivered and 93 individuals responded. This represents a response rate of 9.9 percent.

1. Have you ever considered performing conservation easement appraisal work?

Yes	61	65.6%
No	32	34.4%

2. Are you currently engaged in the practice of conducting conservation easement appraisals?

Yes	9	9.7%
No	84	90.3%

3. When did you complete your last conservation easement appraisal?

I am not engaged in the practice of conservation easement appraisals	51	54.8%
Within the past year	7	7.5%
1-5 years ago	12	12.9%
6-10 years ago	14	15.1%
More than 10 years ago	9	9.7%

4. If your last conservation easement appraisal was more than five years ago, why?

I am not, and never have been, engaged in the practice of conservation easement appraisals	48	51.6%
I am retired	2	2.2%
The risk of civil liability is too high	8	8.6%
The risk of professional discipline is too high	16	17.2%
Such appraisals are too complicated	2	2.2%
I no longer feel qualified/competent to complete such assignments	4	4.3%
There is insufficient work to keep me employed in such a specialty	13	14.0%

5. If you have never completed a conservation easement appraisal, why not? (Check all that apply)

I have completed such appraisals	38	40.9%
The risk of civil liability is too high	23	24.7%
The risk of professional discipline is too high	25	26.9%
Such appraisals are too complicated	2	2.2%
I do not feel qualified/competent to complete such appraisals	21	22.6%
There is insufficient work to keep me employed in such a specialty	24	25.8%

6. What is the largest obstacle keeping you from engaging in conservation easement appraisal work?
(Check all that apply)

I have completed such appraisals	23	24.7%
I lack the experience	15	16.1%
I lack the qualifications, but plan to obtain them	4	4.3%
I would like to practice in this area, but the risk of civil liability is too high	25	26.9%
I would like to practice in this area, but the risk of professional discipline is too high	33	35.5%
There is insufficient work to keep me employed in such a specialty	27	29.0%
I have never considered entering this field of work	19	20.4%

Appendix D - Survey of Certified Conservation Easement Holders

In August 2017, a link to the survey was sent via email to all 40 of the conservation easement holders holding a valid certification as of August 1, 2017. Of these, an estimated 40 were successfully delivered and 22 individuals responded. This represents a response rate of 55 percent.

1. Which of the following best describes your organization?

National land trust	1	4.5%
Regional land trust	1	4.5%
Colorado-based land trust	15	68.2%
State government	1	4.5%
Local government	4	18.2%

2. Approximately, how long has your organization been in existence?

Less than five years	0	
5-10 years	0	
11-15 years	0	
16-20 years	2	9.1%
21-25 years	8	36.4%
More than 25 years	12	54.5%

3. Considering the conservation easements you accept, what is the primary focus of your organization?

Protecting agricultural/ranch land	5	22.7%
Protecting open space	5	22.7%
Protecting habitat for a particular species	1	4.5%
Protecting historical sites	0	
Regional focus	3	13.6%
Local focus	4	18.2%
All of the above	1	4.5%
Protecting riparian areas	1	4.5%
Primary on biodiversity conservation but we work on projects that include ag/ranch land, open space and habitat for particular species as well	1	4.5%
Protecting habitat - not just for a particular species	1	4.5%

4. Approximately how many acres does your organization hold under conservation easements?

- 270
- 1,500
- 2,000
- 2,022
- 2,593

4,000
8,000
9,000
15,000
20,000
22,500
23,800
40,000 (2 respondents)
40,200
58,000
65,000
105,000
227,472
400,000
500,000 (2 respondents)

5. Approximately what percentage of the conservation easements held by your organization involved a conservation easement tax credit?

Less than 10%	3	13.6%
10%-20%	1	4.5%
21%-30%	4	18.2%
31%-50%	1	4.5%
51-75%	3	13.6%
More than 75%	10	45.5%

6. Is your organization accredited by the Land Trust Alliance or other similar non-governmental organization?

Yes	14	63.6%
No	8	36.4%

7. On average, how frequently does your organization monitor its conservation easements?

Twice each year	0	
Annually	21	95.5%
Every 2 years	1	4.5%
Every 3 to 5 years	0	
Never	0	

8. When monitoring the easements held by your organization, who typically does the monitoring?

Paid staff	14	63.6%
Contractors	1	4.5%
Volunteers	1	4.5%
Combination of staff, contractors and volunteers	6	27.3%

9. Approximately how many paid staff does your organization employ?

None	0	
One	2	9.1%
2-5	10	45.5%
More than 5	10	45.5%

10. Approximately what percentage of the conservation easements donated to your organization are accompanied by a cash donation?

Less than 10%	6	27.3%
10%-20%	0	
21%-30%	0	
31%-50%	5	22.7%
51-75%	1	4.5%
More than 75%	10	45.5%

11. Is your organization sufficiently funded to adequately monitor and defend its conservation easements?

Yes	19	86.4%
No	3	13.6%

12. Does your organization have insurance to assist in defending its conservation easements, should the need arise?

Yes	18	85.7%
No	3	14.3%

13. Aside from initial certification as a conservation easement holder, has the Division of Real Estate examined your organization's finances?

Yes	8	36.4%
No	14	63.6%

14. How likely is it that your organization will exist 10 years from now?

Very likely	20	90.9%
Somewhat likely	2	9.1%
Very unlikely	0	

15. Does your organization have contingency plans in place to monitor and defend its conservation easements in the event that it is unable to do so or in the event the organization ceases to exist?

Yes	17	77.3%
No	5	22.7%

16. Does your organization have GIS or Shapefile data for the conservation easements it holds?

Yes	20	90.9%
No	2	9.1%

Appendix E - Conservation Easement Tax Credits Among the States

State	Annual Overall Cap	Individual Cap	Administrative Home	Transferable Tax Credit	Preapproval Required
Arkansas	\$500,000	50% FMV ⁸¹ up to \$50,000, but no more than \$5,000 per year	Arkansas Natural Resources Commission	No	Yes
California	No Annual Cap, but \$100 million program cap	55% FMV - No individual cap	California Natural Resources Agency	No	Yes
Colorado	\$45 million	75% of first \$100,000 FMV, and 50% of all amounts of FMV over \$100,000 not to exceed \$1.5 million	Division of Real Estate	Yes	Yes
Connecticut	None	50% FMV	Department of Revenue Services	No	No
Delaware	\$1 million annual cap, \$10 million program cap	40% FMV up to \$50,000	Department of Natural Resources and Environmental Control	No	Yes
Georgia	\$30 million	25% FMV up to \$250,000 for individuals and up to \$500,000 for corporations.	Department of Natural Resources	Yes	Yes
Iowa	None	50% FMV up to \$100,000	Department of Revenue	No	No

⁸¹ FMV = Fair Market Value

State	Annual Overall Cap	Individual Cap	Administrative Home	Transferable Tax Credit	Preapproval Required
Maryland	None	100% FMV, but no more than \$5,000 per year and no more than \$80,000 total	Department of Natural Resources	No	Yes
Massachusetts	\$2 million	50% FMV up to \$75,000	Office of Energy and Environmental Affairs	No	Yes
Mississippi	None	50% of transaction costs up to \$10,000 per lifetime.	Department of Revenue	No	No
New Mexico	None	50% FMV up to \$250,000 per owner	Energy, Minerals and Natural Resources Department	Yes	Yes
New York	None	25% of property tax up to \$5,000 per year.	Department of Environmental Conservation	Yes, credit runs with the property.	Yes (CE must be registered)
South Carolina	None	Lesser of \$250 per acre or 25% of federal deduction and can claim no more than \$52,500 per year.	Department of Revenue	Yes	No
Virginia	\$75 million	40% FMV up to \$50,000 per year.	Department of Conservation and Recreation	Yes	Yes, if over \$1 million.