



FYI Income 39

Gross Conservation Easement Credit

OVERVIEW

An income tax credit is available for tax years beginning on or after January 1, 2000, for the donation of a perpetual conservation easement in gross on real property located in Colorado. The credit is based on the fair market value (FMV) of the easement. [§39-22-522, C.R.S.] The donation must be made to a governmental entity or a charitable organization that is exempt under section 501(c) (3) of the Internal Revenue Code of 1954, as amended and created at least two years prior to receipt of the easement. [§38-30.5-104(2), C.R.S.] The donation must also qualify as a charitable contribution for federal income tax purposes [Internal Revenue Code section 170(h)].

DEFINITION

Conservation easement in gross is a right of the owner of the easement to prohibit certain acts with respect to the property in order to maintain the property in a manner that will preserve its value for recreation, education, habitat, open space, or historical importance. See §38-30.5-102, C.R.S. for a complete definition.

WHO CAN CLAIM THE CREDIT

Taxpayers qualified to claim the gross conservation easement credit (including transferees of these credits) are:

- Colorado resident individuals,
- C corporations,
- trusts,
- estates,
- members of pass-through entities who receive the credit from such entity, regardless of whether such members are Colorado residents.

A limited liability company with only one member will generally be disregarded for federal tax purposes (IRS Regulation §301.7701-3) as well as state tax purposes. [§39-22-104 (1), C.R.S.] Therefore, a sole member is not a "member of a pass-through entity" and does not qualify as a "taxpayer," for the conservation easement credit unless the member can otherwise satisfy the definition of a "taxpayer" (as a Colorado resident individual, C corporation, trust, or estate).

CREDIT COMPUTATION

- For donations made in tax years beginning on or after January 1, 2007, the credit cannot exceed \$375,000 (50% of the first \$750,000 FMV of the donation).
- For donations made in tax years beginning on or after January 1, 2003 through December 2006, the credit cannot exceed \$260,000 (100% of the first \$100,000 FMV, plus 40% of the next \$400,000 FMV of the donation).
- For donations made in tax years beginning on or after January 1, 2000 through December 31, 2002, the credit cannot exceed \$100,000 (100% of the first \$100,000 FMV).

The total amount of credit claimed by:

- a married couple, regardless of whether they file jointly or separately,
- all members of a pass-through entity, which makes a donation,
- all tenants in common, joint tenants, or other similar ownership groups that donate a gross conservation easement on jointly owned land

is limited to the \$375,000, \$260,000, or \$100,000 amounts above.

ANNUAL LIMITS ON CREDIT

General Rule

In general, the credit a taxpayer can utilize is limited to the net tax liability reported during the tax year. Excess credits may be carried forward for a maximum of 20 years from the year the credit is originally claimed. The credit may not be carried back to a prior tax year.

Surplus Rule

The general rule is expanded to allow taxpayers, but **not** transferees of such credits, to receive a partial refund of the credit if state revenues are in excess of certain thresholds. Taxpayers are limited in the amount of the credit they can utilize in any given tax year if they claim an income tax refund created by this credit. For tax years beginning on or after January 1, 2000, but before January 1, 2003, this limit is \$20,000 per donation per tax year. This limit increases to \$50,000 for donations made in tax years beginning on or after January 1, 2003.

Because the tax attributes of a credit are generally determined by the laws as they exist in the year the credit is created, the increase in the limitation to \$50,000 does not apply to donations made prior to January 1, 2003, even if the credit from such donation is carried forward to tax years beginning on or after January 1, 2003.

Status of Surplus

The gross conservation easement credit is not refundable and is limited to the net tax liability for tax years 2002 through 2004 and 2006 through 2010. The State of Colorado did not have a budget surplus for the years ending June 30, 2002 through June 30, 2004, and as a result of Referendum C that passed at the November 2005 statewide election, there will not be a budget surplus refund for the years ending June 30, 2006 through June 30, 2010.

The credit was refundable for tax years 2000, 2001, and 2005.

Multiple Taxpayers

If the credit generated by a donation is claimed by more than one taxpayer and any of those taxpayers files for a refundable credit, then the aggregate credit utilized by all the taxpayers is limited to \$50,000 (\$20,000 for pre-2003 credits.) This includes:

- A married couple, regardless of whether they file jointly or separately,
- All members of a pass-through entity, which makes a donation,
- All tenants in common, joint tenants, or other similar ownership groups that donate a gross conservation easement on jointly owned land,
- A taxpayer who donates an easement and one or more transferees of that credit.

For taxpayers in such a group to be able to file for a refundable credit, it will be necessary for someone to coordinate the manner in which the credit is utilized by all taxpayers involved or to restrict the credit utilized by the taxpayers to each individual's net tax liability. Failure to do this may result in the credit being over-claimed by the taxpayers/shareholders/members, which would result in an assessment against those taxpayers.

Example: Husband and wife donate a conservation easement in 2001 valued at \$50,000 on land they own as joint tenants. Husband and wife file separate income tax returns. Wife's Colorado income tax liability is \$10,000 and she utilizes \$20,000 of the credit (including a \$10,000 refund). Husband cannot utilize a conservation easement tax credit for 2001.

Example: A limited liability company makes a donation in 2001 of \$60,000 and allocates the credit equally among each of the three members. One member's Colorado income tax liability is \$10,000 and requests another \$10,000 of the credit to be refunded. The two other members have Colorado income tax liability of \$8,000 and \$9,000, respectively. The other two members cannot utilize a credit for 2001 because the aggregate amount of credit utilized by all taxpayers who hold a credit generated by the donation is limited to \$20,000 if a refund is requested by any taxpayer in the group. The other two members can carryforward their credit.

Example: Taxpayer A donates a conservation easement in 2005 valued at \$500,000. Taxpayer A sells \$210,000 of credit to Taxpayer B. Taxpayer A utilizes a \$50,000 credit with a 2005 tax liability of \$6,000. Taxpayer B cannot utilize any of the \$210,000 credit in 2005 because Taxpayer A filed for a refundable credit of \$50,000, the limit for 2005.

Surplus Determination

The state determines in October or November of each year whether there are sufficient excess revenues to permit this refund. During the fiscal year the Governor's Office of State Planning and Budgeting periodically prepares revenue projections.

2011-2013 Limitation Rule

For tax years beginning during 2011 through 2013 the aggregate gross conservation easement credit that can be generated in Colorado is limited to \$26 million per year. Any taxpayer donating a conservation easement during those years must apply with the Division of Real Estate for a tax credit certificate in order to claim the credit on an

income tax return. If the \$26 million in credits has already been approved for the tax year, the Division of Real Estate may issue a tax credit certificate for a future year and that credit may be claimed on the that future year tax return. Any credit based on a donation made during these years will require a credit certificate indicating the tax year in which it may be used. [§39-22-522(2.5) C.R.S.]

CHARITABLE DEDUCTION REQUIREMENT

If a charitable contribution is not allowed because the donation does not meet the requirements of a qualified conservation contribution under the federal laws and regulations of section 170(h) of the Internal Revenue Code, then the Colorado gross conservation easement credit is not allowed for the donation of the easement. [§39-22-522(2), C.R.S.]

Examples of when a gross conservation easement credit is not allowed include:

- The contribution is not made exclusively for conservation purposes,
- The property is already protected by its ownership by a 501(c)(3) organization,
- The donation is made to an unqualified organization.

If a charitable contribution qualifies as a charitable contribution under federal laws and regulations but the deduction is not utilized on the federal return (for example, the taxpayer's income and/or other deductions limit the charitable deductions claimed, a trust's governing instrument does not provide for the charitable deduction) the Colorado gross conservation easement credit is still allowed for the donation of the easement.

FEDERAL DEDUCTION ADBACK

If a charitable deduction is claimed on the federal income tax return for any donation upon which this credit is also claimed, the amount deducted from federal taxable income must be added back to taxable income to determine the taxpayer's Colorado taxable income. [§§39-22-104(3)(g) and 39-22-304(2)(f), C.R.S.]

NOTE: If the federal deduction for this donation exceeds the amount of the credit created by the donation, "addback" only an amount equal to the credit including any credit transferred to another taxpayer or carried forward to future tax years.

Example: A taxpayer donates a conservation easement in 2002 valued at \$440,000. A credit of \$100,000 is claimed in 2002, \$15,000 of which is used on the 2002 tax return with \$85,000 carried forward to 2003. Assuming the 2002 federal charitable contribution deduction claimed is greater than \$100,000, the amount added to taxable income in 2002 will be \$100,000.

High Income Taxpayers

Taxpayers whose 2009 federal adjusted gross income is more than \$166,800 (\$83,400 if married filing separately) and who itemize deductions generally are not allowed to claim all of their itemized deductions for federal income tax purposes.

NOTE: Use this worksheet to determine the amount of conservation easement contribution deduction to addback to taxable income on Form 104.

- | | |
|---|----------|
| 1. Enter the amount from line 11 of federal itemized deduction worksheet* | \$ _____ |
| 2. Enter the amount from line 3 of federal itemized deduction worksheet | \$ _____ |
| 3. Amount on line 1 (above) divided by amount on line 2 (above) | _____ % |
| 4. Amount of charitable deduction for the easement donation from federal Schedule A | \$ _____ |
| 5. Amount on line 4 multiplied by percentage on line 3 | \$ _____ |
| 6. Amount on line 4 minus amount on line 5 | \$ _____ |
| 7. Smaller of line 6 or the credit generated by the donation. | |

The amount on line 7 above is the amount to enter as an addition to taxable income on Form 104.

* The federal "Itemized Deductions Worksheet" can be found in the Schedule A instructions of the federal 1040 instruction booklet.

Example: John Smith Jr. has \$167,238 in total federal itemized deductions. Of that, \$18,916 is not to be included in the computation (not subject to phase-out). After subtracting the amount not subject to phase-out from his total federal itemized deductions, \$148,322 is subject to phase-out. John's conservation easement deduction on federal Schedule A is \$105,000 and he claimed a gross conservation easement credit of \$52,500.

John's Federal Adjusted Gross Income: \$440,908
Threshold Amount \$166,800
Excess \$274,108

Amount of Itemized Deductions NOT Allowed $\$274,108 \times 3\% \times 2/3 = \$5,482$

Amount of Itemized Deductions Allowed $\$167,238 - \$5,482 = \$161,756$

John's federal "Itemized Deduction Worksheet" would look like this:

Line 1: \$167,238 (total itemized deductions)
Line 2: \$18,916 (deductions not subject to phase-out)
Line 3: \$148,322 (deductions subject to phase-out)
Line 4: \$118,658 (80 percent of line 3)
Line 5: \$440,908 (federal adjusted gross income)
Line 6: \$166,800 (federal threshold)
Line 7: \$274,108 (excess income over threshold)
Line 8: \$8,223 (3 percent of amount on line 7)
Line 9: \$8,223 (smaller of line 4 or line 8)
Line 10: \$2,741 (Line 9 divided by 3)
Line 11: \$5,482 (Line 9 minus line 10)
Line 12: \$161,756 (allowable itemized deductions for federal income tax purposes)

John's conservation easement deduction addback to taxable income would be computed as follows:

1. \$5,482 - Federal itemized deductions phased out (the amount from line 11 of the federal itemized deduction worksheet)
2. \$148,322 - Federal deductions subject to phase-out (the amount from line 3 of the federal itemized deduction worksheet)
3. 3.696%: \$5,600 divided by \$148,322 [Amount on line 1 (above) divided by amount on line 2 (above)].
4. \$105,000 - John's charitable deduction associated with the conservation easement credit claimed
5. \$3,881 - Amount of conservation easement deduction disallowed for federal income tax purposes (amount on line 4 multiplied by percentage on line 3)
6. \$101,119 Amount of charitable deduction allowed for federal purposes (amount on line 4 minus amount on line 5)
7. \$52,500 - Amount of charitable deduction to be added back on Colorado return (smaller of line 6 or the credit claimed).

Charitable deduction ceilings

There is a federal ceiling on the amount an individual may deduct each year as a charitable contribution. If the deduction of the conservation easement contribution is limited by this federal ceiling, then the Colorado addback will also be limited to the amount of the contribution actually deducted after any 50% or 30% limitation. However, any contribution carried forward and claimed in a future year would still be subject to the Colorado addback in the year the contribution is actually deducted.

2011-2013 Limitation Rule

The charitable deduction addback for any credit claim that is delayed due to the 2011-2013 limitation of \$26 million per year must still be reported beginning in the year of the donation even if the credit claim is delayed to a later year.

TRANSFERRING THE CREDIT

Taxpayer

A taxpayer can transfer all or part of a credit to a "transferee" who meets the definition of a taxpayer who can claim the credit. [§39-22-522(7), C.R.S.] The taxpayer cannot transfer a credit, which has been used by the taxpayer to offset tax or to claim a refund.

Pass-through entity

A partnership, S corporation or other similar pass-through entity may not purchase a credit. A pass-through entity is a qualified taxpayer eligible to pass a credit to its members only when it "donates a conservation easement as an entity." [§39-22-522(1), C.R.S.]

A pass-through entity can directly transfer a credit if:

1. Each partner, shareholder or member consents to the transfer, and
2. Each partner, shareholder or member could, under the restrictions of the law, have claimed and transferred their pro rata share of the credit directly. [§39-22-522(4)(b), C.R.S.], and
3. The partners, shareholders or members have not yet filed Colorado tax returns and utilized a portion of the credit, sold a portion of the credit, or carried the credit forward to a future year. Once these actions have occurred, any remaining credit must be sold by each individual taxpayer rather than at the entity level.

A pass-through entity must transfer the credit or distribute the credit to its members for the year the donation is made. The entity cannot carryforward a credit to future tax years.

Multiple transfers

A credit can be transferred only once. A transferee, to whom a credit is transferred, cannot thereafter transfer the credit to another. For donations made during tax years prior to January 1, 2003, the minimum amount of credit that can be transferred to any one taxpayer is \$20,000. For donations made beginning on or after January 1, 2003, the donor can transfer all or any portion of the credit. Credits transferred after January 1, 2003 for donations made prior to that date are subject to the \$20,000 limit.

Nonrefundable

A transferred credit utilized by a transferee can never exceed the net tax liability reported on the tax return.

Written statement

Both the donor and transferee must file with their return the DR 1305 setting forth detailed information for EACH credit. A donor must report transfers of the credit on the DR 1305 filed with tax return for the tax year toward which the transferee will be initially applying the credit. For example, if a credit is transferred April 10, 2009 for a transferee to be applied against the transferee's 2008 liability, the donor must report this transfer on the DR 1305 filed with their 2008 return, not the DR 1305 filed with their 2009 return despite the transfer occurring during that year.

Federal Deduction Addback

The transferor of the credit is required to addback the full amount of the gross conservation easement credit even though part or all of the credit is transferred to another taxpayer.

Disallowed credit

If a taxpayer sells a conservation easement credit to another taxpayer and that credit is later disallowed in an audit, the transferee will be held liable for the disallowed credit that was utilized plus penalty and interest. [§39-22-522(9), C.R.S.] All protest rights regarding an adjusted or disallowed credit reside with the donor of the easement or the transferor of the credit who is considered the tax matters representative in all matters with respect to the credit. For additional information regarding the tax matters representative, see Regulation 39-22-522, paragraph 3(j). [§39-22-522 (7)(i), C.R.S.]

Timing

On or after June 7, 2005, a transferee of a conservation easement credit must purchase the credit by the due date of the income tax return, not including extensions, on which the credit will be utilized. Prior to June 7, 2005, a transferee of a conservation easement credit must have purchased the credit prior to the end of the tax year to be able to utilize the credit during that tax year. A purchased credit cannot be utilized or carried back to an earlier tax year than allowed by these rules. [§39-22-522(7)(g), C.R.S.]

Deceased Taxpayer

Upon the death of a taxpayer the gross conservation easement credit passes to the decedent's estate. If the decedent is the donor of the easement, the estate may use the credit to offset income tax owed by the estate or may transfer some or all of the credit according to the transfer rules. If the decedent is a transferee of the credit, the estate may use the credit to offset income tax owed by the estate but may not transfer the credit. [§39-22-522(7)(h), C.R.S.]

Income from the sale

The gain from the sale of the credit is generally recognized as ordinary income and included in federal taxable income. This income is subject to Colorado tax and must be included in Colorado taxable income.

Nonresidents of Colorado

A nonresident of Colorado may sell a credit received from a pass-through entity. The gain from the sale of the credit is generally recognized as ordinary income. The income is from intangible personal property related to a pass-through entity doing business in Colorado. Therefore, this income is sourced to Colorado and is included in Colorado income on the nonresident's Colorado income tax return. [§39-22-109(2)(a)(V), C.R.S.]

State Income Tax Deduction

The Internal Revenue Service National Office has issued a Technical Assistance Memorandum for Area Counsel, Small Business/Self-employed, Area 5 (No. 200126005, release date 6/29/01) stating that individual taxpayers who purchase for value a conservation easement credit as transferees will not lose their federal deduction for state income taxes when they apply the credit to their Colorado income tax liability.

LIMITS ON MULTIPLE CREDITS

Donors

A credit is earned from the qualifying donation of a conservation easement. Only one credit may be earned and claimed each year by the donor of an easement. If the entire credit is not applied against tax in the year the credit is claimed, any unused portion of the credit may be carried forward for up to 20 years.

- Multiple credits may not be earned in one year from multiple donations, even if the donations are made by different pass-through entities, or if one or more of the credits are transferred to other taxpayers.
- Additional credits may not be earned by a taxpayer during any year to which a prior gross conservation easement credit is being carried forward. This is true whether the credit is being carried forward by the taxpayer, or by the transferee who purchased the credit from that taxpayer.
- Additional credits may not be purchased by a taxpayer during any year in which the taxpayer generates a gross conservation easement credit from the donation of an easement.
- Additional credits may not be purchased by a taxpayer during any year to which a prior gross conservation easement credit, that the taxpayer generated, is being carried forward. This is true whether the credit is being carried forward by the taxpayer, or by a transferee who purchased the credit from that taxpayer.

Example: ABC Company claims a \$75,000 gross conservation easement credit during 2000. The credit is utilized as follows: 2000 - \$30,000, 2001 - \$20,000, 2002 - \$24,500, 2003 - \$500

In 2003, the company donates another easement that would qualify for the credit. However, since the \$75,000 credit is not fully utilized until the year 2003, no additional gross conservation easement credit may be claimed for the 2003 donation. If another donation were made in 2004, that donation would qualify for the credit.

2011-2013 Limitation Rule

The limitation and carryforward period for any credit claim that is delayed due to the 2011-2013 limitation of \$26 million per year will be applied based on the year the credit certificate allows the credit to be claimed, not on the year the easement was donated.

Example: An easement donation occurs in 2011 and the tax credit certificate allows the credit to be claimed on the 2012 tax return. If the taxpayer makes another easement donation in 2012, a credit would not be allowed for that donation even if the Division of Real Estate would have waitlisted the credit to 2013. Because the first credit is still available for use in 2012, no additional credit can be claimed in 2012, either on a tax return or on an application to the Division of Real Estate. If the credit is not fully used on the 2012 return, the remaining credit can be carried forward for 20 years through tax year 2032.

Multiple year agreements

A taxpayer can agree to make a series of annual donations in order to maximize the amount of gross conservation easement credit claimed. Each donation must qualify within the limitations of the law in effect at the time donation is made. There are several issues that must be considered to maximize the tax credit available within the constraints of the annual credit limitation.

1. The portion of the property on which the conservation easement is donated must be clearly identified each year.
2. The donation of the conservation easement must qualify as a federal charitable deduction in the year the credit is claimed.
3. The land must be re-appraised for each donation since future appraisals of the remaining property may be affected by prior conservation easements on adjoining land.
4. The entire credit created in a prior year must be completely utilized against Colorado tax, either by the donor or the taxpayer(s) who purchases a credit from the donor, before the donor can claim another easement donation that will qualify for a gross conservation easement tax credit.
5. If the IRS determines that one or more of the donations made pursuant to the agreement constitutes a single donation, then the department will also treat the donations as one donation.
6. Each donation must stand on its own merits and can not rely on future donations to meet the requirements of a qualified donation.

Transferees

For tax years beginning on or after January 1, 2003, there is no limit to the number of transferred conservation easement credits a transferee can utilize for any tax year.

For tax years beginning prior to January 1, 2003, a transferee of a credit can utilize only one credit per year. A transferee cannot purchase a new credit until the tax year after which a previously purchased or claimed credit was utilized in full.

PART-YEAR RESIDENTS AND NONRESIDENTS OF COLORADO

Part-year residents may claim the credit only if the donation is made while they were a Colorado resident.

Nonresident individuals of Colorado cannot claim the gross conservation easement credit for a donation they have made or for a credit they have purchased.

The portion of the credit apportioned to nonresident members of a pass-through entity however, can be used to offset the tax liability of the nonresidents. This is because there is no residency requirement for members of a pass-through entity. The credit must be allocated to the entity's partners or shareholders in proportion to the partners' or shareholders' distributive shares of income from such entity.

If a credit is claimed by a Colorado resident who later moves to another state, any carryover credit can still be utilized by that taxpayer if they continue to have a Colorado tax liability despite being a nonresident of Colorado.

DOCUMENTATION

DR 1305

Colorado Gross Conservation Easement Credit Schedule (DR 1305) must be attached to any Colorado income tax return that claims or utilizes a gross conservation easement credit. This includes:

- A taxpayer who utilizes the credit to offset a tax liability during the tax year,
- The donor of the easement in the year of the donation (including a pass through entity and its shareholders, partners, or members) who sells the entire credit rather than utilizing the credit,
- A taxpayer who is not utilizing the credit to offset tax, but is carrying the credit forward to the following year,
- A taxpayer who is not utilizing the credit to offset tax, but has transferred the balance of the credit to another taxpayer during the tax year.

A transferee must attach to their DR 1305 a copy of the appraisal summary. An executive summary, summary of salient facts or other document including general information from the appraisal such as the appraiser's name, the valuation methodologies employed and the before and after values of the property may be submitted to satisfy this requirement.

DR 1303

The donor(s) of a gross conservation easement claiming the credit must attach a Colorado Gross Conservation Easement Donor Schedule (DR 1303) to the Colorado income tax return that initially claims a gross conservation easement credit. This includes a pass through entity and its shareholders, partners or members, but not transferees of the credit. The form includes a sworn affidavit from the entity that holds the conservation easement in gross. A summary of a qualified appraisal, a recorded deed including reception number, a completed federal Form 8283, and the appraisal and appraiser affidavit submitted to the Division of Real Estate must be attached to the DR 1303.

If the taxpayer is a member of a pass-through entity that donated the easement, they may choose not to attach a complete copy of the appraisal if, and only if, the pass-through entity previously filed a return including the complete appraisal.

If filing an income tax return electronically, mail the paper DR 1303 and attachments separately at the time of filing to Colorado Department of Revenue, Conservation Easement Section, Denver CO 80261-0005.

DR 1304

The donor(s) of a gross conservation easement claiming the credit must submit a Colorado Gross Conservation Easement Public Information Schedule (DR 1304) for the year of donation separately from the Colorado income tax return. This includes a pass through entity and its shareholders, partners or members, but not transferees of the credit. This form includes information that will be released to the public. This form should be filed online at www.revenue.state.co.us/easementinformation/form

To view public information from the DR 1304s filed with the Department of Revenue, visit the Department of Revenue Web site at www.TaxColorado.com

DR 1299

Every charitable organization or governmental agency that accepts a conservation easement in gross in Colorado for which a credit is claimed must file a Colorado Gross Conservation Easement Holders Submission of Information (DR 1299). The report must be filed each year in which a credit generating easement is accepted and prior to both April 15th of that year and the date of donation. The organization must include in the report the total number of easements it holds as of the date of filing and separately list the number of acres encumbered by such easements except for those properties for which the sole conservation purpose is historic preservation. Federal agencies that accept easements are exempt from this filing requirement.

DR 1299 must be filed with the Department of Revenue and Division of Real Estate. Copies of the form are available to the public from the Department of Revenue or Division of Real Estate.

WATER RIGHTS

A gross conservation easement that encumbers water rights will qualify for the credit only if it is a perpetual donation. If a conservation easement donation includes revocable water rights that do not qualify for a federal charitable contribution, then the donation would not qualify for the Colorado tax credit. [§38-30.5-103, C.R.S.]

FYIs provide general information concerning a variety of Colorado tax topics in simple and straightforward language. Although the FYIs represent a good faith effort to provide accurate and complete tax information, the information is not binding on the Colorado Department of Revenue, nor does it replace, alter, or supersede Colorado law and regulations. The Executive Director, who by statute is the only person having the authority to bind the Department, has not formally reviewed and/or approved these FYIs.