



2008 MODEL CONSERVATION CREDIT ACT

**A companion publication to the
Conservation Resource Center's 2007 Report:
*State Conservation Tax Credits: Impact and Analysis***



CONSERVATION RESOURCE CENTER



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Conservation Resource Center staff involved in this publication includes
Mike Strugar, Debra Pentz, Tina Burghardt and Roman Ginzburg

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Conservation
Resource Center
Tax Credit Exchange
820 Pearl Street, Suite F
Boulder, CO 80302

303.544.1044 phone
303.544.1043 fax
www.taxcreditexchange.com

Both the *2008 Model
Conservation Credit Act* and
the *2007 State Conservation Tax
Credits: Impact and Analysis*
reports are available at the
Conservation Resource
Center's website:
TaxCreditExchange.com

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50 PREFATORY NOTE

51 The principal purpose of the Model Conservation Credit Act (“Act”) is to serve as
52 guideline legislation. States can borrow from the Act or adapt it in full to suit their
53 individual needs and conditions for a conservation tax credit program. Please note that
54 this is an educational piece and is not intended to promote the adoption of any specific
55 legislation. In addition, any states considering adoption of legislation should consult their
56 own professionals and should not rely solely on this sample legislation.

57 The programs of the twelve states already using conservation credits (“CCs”) vary
58 substantially. The State Conservation Tax Credits: Impact and Analysis Report (“Report”),
59 published by the Conservation Resource Center (“CRC”) in March of 2007, assesses the
60 effectiveness of the different program features in advancing land conservation. A copy of
61 the Report can be found on CRC’s website: TaxCreditExchange.com.

62 The Act is based on, and should be read in conjunction with, the Report. The Act primarily
63 implements the Report’s recommendations; therefore, most of the explanatory footnotes
64 herein refer to the Report for rationale and discussion of other alternatives. All discussions
65 external to the Report are introduced by an “Additional Thoughts” label.

66 The Act utilizes a substantial credit value, select restrictions on credit transactions,
67 and transferability to create an efficient CC that provides a potent incentive for private
68 land conservation with few transaction costs. Limiting transaction costs increases the
69 value of a CC to a donor, allowing a state to provide a higher conservation incentive
70 without spending more public funds. Quality control is ensured through a coarse pre-
71 approval screen that eliminates blatantly abusive transactions. All CCs are also subject
72 to a post-return audit.

73 The Act borrows heavily from the federal income tax conservation contribution deduc-
74 tion statute, 26 U.S.C.A. §170(h). As the Report notes, using 26 U.S.C.A. §170(h)
75 offers a simplified method of setting program rules. A state benefits from the federal
76 government’s experience and guidance, and it can coordinate enforcement efforts with the

77 Internal Revenue Service. Conformity, however, also subjects the state CC program to federal
78 policy and enforcement interests. The Act limits federal influence by explicitly empowering a
79 state’s tax authority to interpret the application of 26 U.S.C.A. §170(h) and accompanying
80 Treasury Regulations.

81 In drafting the Model Conservation Act, CRC referenced the drafting guidelines of the
82 National Conference of Commissioners on Uniform State Laws and the American Law Institute.
83 Neither of these organizations directly participated due to the relatively narrow scope of the
84 Act and the prolonged, three to eight year, drafting process used by the organizations. For
85 more information please contact CRC at: 303.544.1044.

86 **SECTION 1. [SHORT TITLE]** This act shall be known and may be cited as the
87 “(Conservation Credit Act of 20__)”.

88 **SECTION 2. [DEFINITIONS]** In this act:¹

89 (1) Qualified real property interest means a conservation easement or a full real-
90 property interest as defined under 26 U.S.C.A. §170(h)(2) and corresponding regulations
91 in 26 C.F.R. §170A-14(b). Either interest must be in fully instate land.²

92 (2) Qualified conservation purposes mean conservation purposes as defined by
93 26 U.S.C.A. §170(h)(4) and corresponding regulations in 26 C.F.R. §170A-14(b).³

94 (3) Eligible donee means a qualified organization under 26 U.S.C.A. §170(h)(3)
95 and corresponding regulations in 26 C.F.R. §170A-14(c). Any non-governmental organization
96 must have adopted Land Trust Alliance (“LTA”) Standards and Practices.⁴

97 (4) Eligible donor means any person or entity who, owns a qualified real property
98 interest, including individuals, corporations, trusts and estates, partners in partnerships and other
99 flow through entities, and both marriage partners.⁵

100 (5) Qualified appraisal means an appraisal in accordance with 26 C.F.R. §170A-
101 13(c)(4) and the Uniform Standards of Professional Appraisal Practice (“USPAP”).⁶

¹ Additional Thoughts: the Act adopts the federal definitions for key terms. Many states will have already customized the definitions for qualified real property interests and conservation purposes, defined in Section (2)(1-2) of the Act, when enacting their conservation easement enabling statutes. These state definitions can be used to supplement or independently define the key terms when appropriate.

² For a discussion of options for what type of land should be protected refer to Part II, §A of the Report. The Act allows both conservation easement and fee title donations to maximize land protection.

³ For a discussion of options for what conservation values may be protected refer to Part II, §B of the Report.

⁴ For a discussion of options for what types entities should be eligible to hold a donation refer to Part II, §E of the Report. Using §501(c)(3) organizations to accept conservation easement donations allows a state to save significant resources by passing on the perpetual monitoring requirements to nonprofits.

⁵ For a discussion of options for who should be eligible to earn a CC refer to Part II, §D of the Report.

⁶ Additional Thoughts: Since the value of the CC is calculated based on the appraisal value of a CE, it is imperative that appraisers follow strict guidelines to prevent abuses. As the Report notes in Part I, §B(3), experts believe that appraisal accuracy is essential for program effectiveness.

102 **SECTION 3. [APPLICABILITY]** On or after (1/1/20__), an eligible donor who donates
 103 a qualified real property interest for a qualified conservation purpose to an eligible donee may
 104 earn a conservation credit ("CC") pursuant to Section 4(b).

105 **SECTION 4. [USE, LIMITS, CARRY-FORWARD, TRANSFERS]**

106 (a) An approved CC may be used to offset income tax liability as defined by (*appropriate*
 107 *section of state income tax statute*).⁷ The CC may not be used, by amendment or otherwise,
 108 against taxes owing for tax years prior to the year in which the CC was earned or acquired by
 109 the taxpayer.

110 (b) A CC is limited by the following rules⁸:

111 (1) The value of a CC shall equal fifty percent (50%) of the fair market value of the
 112 qualified real property donation calculated to exclude any short term capital gain pursuant to
 113 26 U.S.C.A. §170(e)(1)(A). In no case shall the value of a CC exceed three hundred thousand
 114 dollars (\$300,000).

115 (2) Only one CC may be earned per a qualified real property interest donation.

116 (A) If the qualified real property interest is held in common ownership, the CC
 117 shall be allocated in proportion to respective ownership shares.

118 (B) If the qualified real property interest is held by a pass-through entity, the CC
 119 shall be allocated as prescribed under 26 U.S.C.A. §704(b) and corresponding regulations in
 120 26 C.F.R. §1.704A-1(b)(4)(ii).

121 (3) An eligible donor may earn only one CC per income tax year.

122 (c) Any qualified donor holding a pre-approved CC may transfer it in part or in full to
 123 another person or entity for use against the state income tax under (*appropriate section of the*
 124 *state income tax statute*).⁹ In order for the transferee to apply the CC against taxes for a particu-
 125 lar year, the transferee must have acquired the CC on or before the date upon which the

⁷ For a discussion of options for type of credits refer to Appendix C: Ft. #1 of the Report.

⁸ For a discussion of options for CC valuation and caps refer to Part II, §C of the Report.

⁹ For a discussion of options for maximizing the effectiveness of CCs refer to Part II of the Report.

126 transferee's taxes are due (without extensions) for the year in question.

127 (d) In determining any carry-forward amount, the following rules apply:

128 (1) The amount of CC used in a taxable year, when combined with all other state in-
129 come tax credits of the user, may not exceed the user's total state tax liability for the taxable year.

129 (2) Any unused portion of CC may be carried forward up to fifteen (15) years. Any
130 unused portion of a CC shall survive the death of the individual and may be *used* or transferred
131 by the decedent's estate.¹⁰

132

133 **SECTION 5 [APPROVAL PROCESS]¹¹**

134 (a) Before an eligible donor may use or transfer a CC, an eligible donor shall attain
135 approval from the (Approving Authority) established by Section 6(b)(1).¹² Receipt of approval
136 from the (Approving Authority) signifies only the satisfaction of the screening requirements
137 pursuant to Section 6(b)(2). The approval has no probative value in another state or federal
138 administrative action, such as an audit review of the CC used.

139 (1) The eligible donor shall submit to the (*Approving Authority*) an application for
140 approval on a form created by the (*Approving Authority*) that contains information required
141 by the (*Approving Authority*) to assess the criteria pursuant to Section 6 (b)(2). Such documents
142 may include a draft or recorded conservation easement, a copy of a qualified appraisal, and
143 any other required information.

144 (2) An eligible donor may apply for conditional approval before a qualified real
145 property interest donation has been recorded. If conditional approval is granted, the applica-
146 tion must be resubmitted to the (*Approving Authority*) after the donation has been recorded for
147 the limited purpose of demonstrating conformity with the draft documents.

148 (3) The (*Approving Authority*) shall notify the eligible donor of its decision within (60)

¹⁰ For a discussion of options for maximizing the effectiveness of CCs refer to Part II of the Report.

¹¹ For a discussion of options for program oversight refer to Part II, §H of the Report.

¹² For a discussion of reasons for such approval, refer to Part II, §H(3) of the Report. The Act's approval process is based on the Sample Transaction Screen included as Appendix B of the Report.

149 days of receiving an application or within (30) days of receiving a resubmission.

150 (4) In the event of approval, the (*Approving Authority*) shall issue a tracking number
151 to the donor. To use the CC, the donor or transferee shall enter the tracking number on the
152 appropriate tax forms issued by the (*Tax Authority*), thus indicating receipt of approval.

153 (5) The (*Approving Authority*) shall provide a brief statement of reasons for a decision
154 to deny approval. Once the problems identified by the (*Approving Authority*) have been
155 remedied, an eligible donor may resubmit the application for approval. Decisions to deny
156 approval are not subject to appeal.

157 (6) Initial applications for approval must be accompanied by a processing fee of (\$500).
158 The (*Approving Authority*) shall receive this fee to administer the requirements of this Section.

159 (b) The following rules and procedures must be followed to transfer a CC:

160 (1) A transferor and a transferee shall notify the (*Tax Authority*) of a CC transfer.
161 Both parties shall provide the CC tracking number and amount transferred on the appropriate
162 tax forms, which shall be filed with the income tax return for the year in which the CC transfer is
163 made. A transferee may not use a transferred CC unless the transferor's written statement
164 verifies the amount of CC used by the transferee.

165 (2) The donor of a transferred CC shall be the tax-matters representative in all matters
166 with respect to the CC. A tax-matters representative shall be responsible for representing and
167 binding the transferees with respect to all issues affecting the CC, including, but not limited
168 to, the appraisal, notifications, correspondence from and with the (*Tax Authority*) and IRS,
169 audit examinations, assessments, settlement agreements, and the statute of limitations and
170 extensions thereof. Final resolutions of disputes regarding a CC between the (*Tax Authority*)
171 and a tax- matters representative, including administrative and judicial decisions, shall be
172 binding on transferees.

173 (3) In the event the transferred CC is disallowed or devaluated in audit procedures,
174 the (*Tax Authority*) shall first make demands for payment of any additional tax, together with
175 interest and penalties, from the CC earning donor. In the event such payment demand is not
176 voluntarily satisfied within applicable time limit, the (*Tax Authority*) shall proceed to collection
177 against the transferees on a pro-rata basis.

178 **SECTION 6. [ADMINISTRATIVE]**179 (a) To administer the CC program, the (*Tax Authority*) is authorized:180 (1) to require additional information from an eligible donor or transferee regarding
181 the appraisal value of the easement, the amount of the CC, the validity of the CC, and other
182 relevant matters.183 (2) to review, for good cause shown, and accept or reject, in whole or in part, all
184 aspects relating to a CC, including compliance with federal rules and regulations. In applying
185 federal rules and regulations, the (*Tax Authority*) shall determine whether a used CC complies
186 with the appropriate Internal Revenue Code sections and Treasury Regulations pursuant
187 to Section 2. Any positions taken by the United States Commissioner of the Internal Revenue
188 Service and/or any federal courts should be considered but are not binding on the (*Tax*
189 *Authority*).¹³190 (b) The approval process pursuant to Section 5(a) shall be administered by a panel
191 created pursuant to Paragraph (1), below, that shall review applications pursuant to criteria of
192 Paragraph (2).¹⁴193 (1) There is created (*the conservation tax credit approval panel* (“*Approving*
194 *Authority*”)) to administer the approval program. For administrative support purposes, the
195 (*Approving Authority*) shall be assigned to the (*Tax Authority*).196 (A) The (*Approving Authority*) shall consist of three members: a representative of
197 the department of revenue who is knowledgeable about appraisal valuations; a representative
198 of the state department of natural resources who is knowledgeable about conservation values;
199 and a representative of the state attorney general who is knowledgeable about the legal require-
200 ments for qualified real property interests.

201 (B) The panel members shall be appointed administratively by the directors of the

¹³ Additional Thoughts: By explicitly providing for state tax authority discretion over the federal requirements, the Act partially insulates a state from the drawbacks of conformity with federal rules as discussed in Part II §(B)(1) of the Report.

¹⁴ Additional Thoughts: For ease of administration, instead of forming a panel, a state could designate a department director to make approval decisions and to set up a supporting administrating system.

202 respective departments and may be changed from time to time at the pleasure of the directors.

203 (2) The *(Approving Authority)* shall limit approval review to the following considerations:

204 (A) Whether the appraisal appears to meet minimum USPAP standards and IRS
205 requirements for a qualified appraisal pursuant to Section 2(e), and whether its valuation does
206 not appear to be manifestly abusive.

207 (B) Whether the conservation values arguably comply with the requirements
208 pursuant to Section 2(b).

209 (C) In the case of a conservation easement donation, whether the documentation
210 required for the CC arguably complies with minimum standards for a qualified easement
211 pursuant to Section 2(a).¹⁵

212 (c) The *(Tax Authority)* shall issue a report every year summarizing by county the following
213 annual totals:

214 (1) Number of qualified real property interest donations approved by *(Approving*
215 *Authority)*.

216 (2) Fair market value of qualified real property interest donations approved by
217 *(Approving Authority)*.

218 (3) Value of CCs approved by the *(Approving Authority)*

219 (4) Value of used CCs by class (eligible donors or transferees).

220 (5) Acreage of qualified real property interests donated approved by the *(Approving*
221 *Authority)*, by donee class (land trust, government, other).

222 (d) The following bodies shall have the following rulemaking power:

223 (1) The *(Approving Authority)* shall promulgate rules for the implementation of the
224 approval screen pursuant to Paragraph (b)(2). Such rules shall be promulgated in accordance
225 with (State's Administrative Procedures Act statute).

226 (2) The *(Tax Authority)* shall promulgate all other rules and regulations necessary to
227 implement and administer this Section.

¹⁵ Additional Thoughts: If a state is concerned about land fragmenting, the Approving Authority can be authorized to review whether a qualified real property donation has clearly been structured to circumvent the one Conservation Credit per donation per year limitation.



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