District Court, Jefferson County, State of Colorado Court Address: 100 Jefferson County Parkway Golden, Colorado 80401 Phone Number: (303) 271-6145	DATE FILED: December 3, 2013 7:47 PM CASE NUMBER: 2011CV4124
PLAINTIFFS/APPELLANTS: RODNEY C. ATHERTON and ELLYN R. ATHERTON, individually and as tax matters representative for Blaine Rollins, Elizabeth Rollins, Mitchell Solich, and Barbara Solich, v. DEFENDANT/APPELLEE: BARBARA BROHL, in her official capacity as Executive Director of the Colorado Department of Revenue.	↑ COURT USE ONLY ↑ Case Number 2011CV 4124 CE Region 1

ORDER RE: VALIDITY OF CONSERVATION EASEMENT TAX CREDITS

THIS MATTER came before the Court on the 23rd and 24th days of July, 2013, for a hearing to determine the validity of two (2) conservation easement tax credits claimed by the Plaintiffs. The Plaintiffs RODNEY C. ATHERTON and ELLYN R. ATHERTON appeared individually and as tax matters representatives for other named Plaintiffs in this action. The Plaintiffs Athertons (hereafter referred as either "Plaintiffs" or "Athertons") appeared Pro Se. The Defendant, Barabara Brohl, appeared in her official capacity as Executive Director of the Colorado Department of Revenue (hereafter referred to as "Revenue" or "DOR") and was represented by John W. Suthers, Colorado Attorney General and trial counsel appearing for "Defendant" were Michael Axelrad and Grant Sullivan.The Court heard the testimony of witnesses and received evidence from the parties at the hearing. The Court has considered all issues as raised in the Trial Management Order filed July 16, 2013, as amended prior to and during trial.

JURISDICTION AND STANDARD OF REVIEW

This Court's jurisdiction to hear this case as an appeal from the Department of Revenue is conferred upon it pursuant to § 39-21-105 (2), C.R.S. and § 39-22-522.5, C.R.S. The District Court shall try the case de novo, reviewing all questions of law and fact, such review being conducted in accordance with the Colorado Rule of Civil Procedure. § 39-21-105 (2)(b), C.R.S.

ISSUES

The issues before the Court in this de novo appeal relate to the disallowance by DOR of two conservation easement ("CE") tax credits for tax years 2002 and 2005, pursuant to § 39-22-522.5(2), C.R.S.

Plaintiffs seek a determination that their claimed CE tax credits related to the Conservation Easements created in 2002 and 2005 are valid. DOR seeks a determination that the 2002 and 2005 CEs and the applications for CE tax credit failed to comply with federal and state law, and thus the resulting CE tax credits are invalid. DOR seeks judgment in the amount of $59,814.68, reflecting Plaintiffs' owed tax, penalties and interest. Additionally, DOR seeks a judgment invalidating Plaintiffs' $9,048.00 in unused CE tax credits.

There are (5) five issues that are before this Court for determination:

I. Did Plaintiffs' application for tax credits in tax years 2002 and/or 2005 fail to comply with the requirements set forth in § 39-22-522(2) and (3), C.R.S., specifically failing to file a summary of a qualified appraisal, as defined in Treas. Reg. § 1.170A-13(c)(4)(1998);

II. Did Plaintiffs' appraisals supporting the CE tax credits meet the standards of a "qualified appraisal" as required under the Treas. Reg. § 1.170A-13(c)(3);

III. Did Plaintiffs' maintain contemporaneous written acknowledgements ("CWA") substantiating their CE donations, as required by 26 C.F.R. § 1.170A-13(f), in order to qualify for the state tax credit pursuant to § 39-22-522, C.R.S.;

IV. Did Plaintiffs satisfy in either 2002 and/or 2005 the mandatory documentation requirement regarding "baseline reports" sufficient to meet the requirements in Treas. Reg. § 1.170A-14(g)(5); and,

V. Did DOR, in its review and disallowance of the 2002 and/or 2005 conservation easement tax credits, engage in selective enforcement of its rules, regulations and interpretation of applicable state and federal law and deny Plaintiffs due process and equal protection under Colorado and United States Constitutions.

FINDINGS OF FACT

STIPULATED FACTS

The parties stipulated to the following facts in the Trial Management Order, filed July 16, 2013:

A. The 2002 Conservation Easement

1. In 2002, Plaintiffs owned real property in Jefferson County, Colorado, known as Lot 6, Mace Subdivision, totaling approximately 1.183 acres ("2002 Parcel)".

2. The 2002 Parcel is adjacent to Plaintiff's residence.

3. In December 2002, Plaintiffs granted a conservation easement ("CE") on the 2002 Parcel in favor of Noah's Crib ("2002 CE"). The 2002 CE deed was recorded with the Jefferson County Clerk and Recorder's Office on December 31, 2002.

4. Noah's Crib sent a letter to Plaintiff Rod Atherton, dated December 31, 2002 acknowledging receipt of $1,280 in monetary donations made by Plaintiffs in 2002; the letter does not mention the 2002 CE.

5. Plaintiffs retained David E. Peterson and Kevin D. Shea to appraise the 2002 CE. On April 10, 2013, Messrs. Peterson and Shea transmitted a report to Plaintiffs that concluded the value of the 2002 CE was $160,000. As of the date of the report, Messrs. Peterson and Shea were both Certified General Appraisers.

6. Plaintiff Rodney C. Atherton and Plaintiff Ellyn R. Atherton are married and jointly filed their 2002 Colorado state income taxes. Plaintiffs signed their joint 2002 Colorado state income tax return on July 3, 2003, and filed it with Revenue some time thereafter.

7. Plaintiffs filed with their 2002 Colorado state income tax return a Colorado Form DR 1305, in which Plaintiffs claimed a $100,000 CE tax credit corresponding to the 2002 CE ("2002 CE tax credit").

8. The Form DR 1305 states that $80,000 of the 2002 CE tax credit had been transferred to Blaine Rollins, and that Plaintiffs claimed a $140,000 charitable deduction for the 2002 CE on their 2002 federal income tax return.

9. Plaintiffs did not file a Federal IRS Income Tax Form 8283 with their 2002 Colorado state income tax return.

10. In tax years 2002 through 2004, Plaintiffs used a total of $20,000 of the 2002 CE tax credit to offset their state income tax liability. Blaine Rollins used $80,000 of the 2002 CE tax credit in tax year 2002 to offset his state income tax liability.

11. Plaintiffs' claim for 2002 CE tax credit was denied by DOR in a letter sent to Plaintiffs, dated April 4, 2007. A corresponding Notice of Deficiency, dated April 4, 2007, was sent by Revenue to Plaintiffs alleging the underpayment of tax and imposition of penalties and interest associated with the disallowed 2002 CE tax credit.

12. Plaintiffs protested DOR's disallowance of the 2002 CE tax credit and requested a hearing in a letter sent to DOR, dated May 4, 2007.

B. The 2005 Conservation Easement

13. In 2005, Plaintiff Ellyn R. Atherton owned real property in Jefferson County, Colorado, totaling approximately 2.55 acres ("2005 Parcel").

14. The 2005 Parcel is adjacent to Plaintiffs' residence and the 2002 Parcel.

15. In December 2005, Plaintiff Ellyn R. Atherton granted a CE over the 2005 Parcel in favor of Noah Land Conservation ("2005 CE"). The 2005 CE deed was recorded with the Jefferson County Clerk and Recorders Office on December 30, 2005.

16. Plaintiffs retained Thomas John Stewart and Mackinzie E. Hunt to appraise the 2005 CE. On November 8, 2005, Mr. Stewart and Ms. Hunt transmitted a report to Plaintiffs that concluded the value of the 2005 CE was $510,000. As of the date of the report, Mr. Stewart was a Certified General Appraiser and Ms. Hunt was a Certified Residential Appraiser.

17. Plaintiff Rodney C. Atherton and Plaintiff Ellyn R. Atherton jointly filed their 2005 Colorado state income tax return. After signing it, Plaintiffs filed their joint 2005 Colorado state income tax return.

18. Plaintiffs filed with their 2005 Colorado state income tax return a Form DR 1305, in which Plaintiffs claimed a $260,000 CE tax credit corresponding to the 2005 CE ("2005 CE tax credit").

19. The Form DR 1305 stated that $235,000 of the 2005 CE tax credit had been transferred to Mitchell L. Solich, and that Plaintiffs claimed $25,000 of the 2005 CE tax credit. The Form DR 1305 also stated that Plaintiffs claimed a $510,000 charitable deduction for the 2005 CE on their 2005 federal income tax return.

20. Plaintiffs did not file a Federal IRS Income Tax Form 8283 with their 2005 Colorado state income tax return.

21. Plaintiffs used $15,952 of the 2004 CE tax credit in tax year 2005 to offset their state income tax liability; $9,048 of Plaintiffs' 2005 CE tax credit remains unused. Mitchell L. Solich used $235,000 of the 2005 CE tax credit in tax year 2005 to offset his state income tax liability.

22. Plaintiffs' claim the 2005 CE tax credit was denied by DOR in a letter sent to Plaintiffs, dated October 8, 2010. A corresponding 2005 Tax Year Summary and Statement of Account, also dated October 8, 2010, was sent by DOR to Plaintiffs alleging the underpayment of tax and imposition of penalties and interest associated with the disallowed 2005 tax credit.

23. Plaintiffs protested DOR's disallowance of the 2005 CE tax credit and requested a hearing in a letter to DOR, dated October 15, 2010.

TESTIMONY PRESENTED AT HEARING

A. Plaintiff's Witnesses

24. Ellyn R. Atherton testified that after obtaining her degree from the University of Northern Colorado she successfully pursued her Juris Doctorate, but has never engaged in the practice of law. She testified that she and Mr. Rodney Atherton purchased the property which is the subject of the contested conservation easements in 2002. According to her description, the property was a rat infested dump site and represented an opportunity to engage in a small reclamation project

which would result in adding “open space” in the area. Ms. Atherton stated that she is very passionate about open space and wanted to provide an alternative to development of subdivisions in an area of Jefferson County, Colorado that has views of the Flat Irons and Stanley Lake. She described the use of the property today as being primarily open space with 3 llamas and 2 wool bearing goats grazing on the property.

Ms. Atherton stated that she was familiar with a non- profit organization called, “Noah’s Crib”. She stated “Noah’s Crib” had a primary purpose of working with youth that were either juvenile or young adult criminal offenders that would benefit from mentoring and an opportunity to camp and live on location in more remote natural areas. Ms. Atherton stated Mr. Randall Cornejo was the President of Noah’s Crib in 2002 when the first Conservation Easement Deed was signed and recorded. She testified that Mr. Cornejo resigned his position with Noah’s Crib and left the area to pursue other interests. Ms. Atherton stated that she and Mr. Atherton relied heavily upon the real estate appraisers that they hired in 2002 and 2005 because they believed the appraisers had the degree of expertise and experience necessary to complete all appraisal work to meet both federal and state requirements for conservation easement related transactions. Ms. Atherton testified about the history of Noah’s Crib and how it evolved into Noah Land Conservation by 2005 with Paul Geer as its Director. Ms. Atherton states that between 2005 and July 2013 she has assisted in gathering documents for tax audits related to either Noah’s Crib or Noah Land Conservation on at least five (5) separate occasions. She believes that some of the critical documents that may be needed to succeed in this appeal have been lost by employees of various government departments. Ms. Atherton stated that she was aware that at the time of the creation of the 2002 and 2005 conservation easements, both she and Mr. Atherton relied heavily on information contained in DOR’s Income Tax Return instructions for taxpayers. Ms. Atherton believes if there are any filing or non-compliance issues related to the Colorado DOR’s regulations, it is because of lack of specific information being contained in the Income Tax Return instructions published and distributed under the direction of DOR.

25. Rodney Atherton, a Plaintiff and the tax matters representative (“TMR”) in this case, testified that he obtained a B.A. in Accounting at Oklahoma State University in 1986, a Juris Doctorate from Washburn University in 1989 and an LLM in Tax from the University of Denver in 1990. His practice was primarily focused on Wills and Trusts until 1993 when his focus included corporate and real estate transactions. He has practiced with large firms in areas of taxation and estate planning and now describes his practice as “transactional law”. He testified he was aware of Colorado laws regarding conservation easements, particularly beginning in 1999. Mr. Atherton testified he followed the 2002 and 2005 Colorado income tax return filing instructions generated by DOR. Although the instructions referred to an FYI Income 39 which provided information specifically on Gross Conservation Easement Tax Credits, he asserts that the title “For Your Information” did not alert them that it would contain mandatory filing requirement instructions. DOR Hr’g Ex. R and Ex. S. Instead, Mr. Atherton maintains that he relied on the Colorado Income Tax Instructions in “good faith” and that DOR should not be allowed to disallow his credits because he provided them with incomplete information. Regarding the Summary of Qualified Appraisal requirement in 2002, Mr. Atherton argues that IRS rules permit the summary to be filed in 90 days after an IRS requests a taxpayer to produce it. He alleges that a similar Colorado provision prohibits DOR from asserting that taxpayers must strictly comply with the filing requirements in order to be eligible for the credit.

In 2005, Mr. Atherton states that he timely provided DOR with a Summary of Qualified Appraisal and a Colorado Form DR 1305. Mr. Atherton acknowledges there was no IRS Form 8283 filed in support of the 2002 conservation easement, but that he is certain one was filed for the 2005 conservation easement. Mr. Atherton's position is that most of the necessary information on the 8283 Form is included in Form DR 1305 and under "substantial compliance" standards DOR had all it needed to perform its functions. Mr. Atherton also asserts that he substantially complied with the Colorado State Income Tax Instructions generated by DOR. He states the requirement for a Contemporaneous Written Acknowledgement ("CWA") was necessary for both the 2002 and 2005 conservation easement transactions. He maintains that DOR made no requests for the documents at issue until it became apparent to DOR that Plaintiffs were not anxious to settle the controversy. However, Mr. Atherton asserts that he responded to any of DOR's requests in a timely and meaningful manner. Finally, he maintains that DOR did not apply a "strict compliance" standard on the subject filing requirements until the appeals phase of these proceedings. He asserts that DOR's reasons for denying the validity of the 2002 and 2005 conservation easements evolved to a "strict compliance" standard overtime.

26. Paul Geer testified he is employed as the Director of Colorado Natural Land Trust formerly known as Noah's Crib and Hunting for Purposes. He is involved with 281 conservation easement donations, but does not generally give advice to donors regarding the selection of appraisers. Mr. Geer stated he has developed some higher degree of knowledge regarding the requirements for a "Qualified Appraisal" for conservation easement purposes since the early 2000's when he became involved in administering numerous conservation easement trusts. Mr. Geer stated he reviewed the 2005 Appraisal completed by Mr. Thomas John Stewart and did not have any problems with the report, although he knows Mr. Stewart had significant disciplinary actions imposed against him by regulatory authorities. Mr. Geer stated that in 2007, the Colorado Natural Land Trust adopted business and procedural standards and practices that it routinely adheres to today, but it did not have a checklist regarding requirements for a valid conservation easement for 2002 and 2005. He stated he did recall there was a standard practice to write a CWA and he is certain he signed a CWA for the 2005 conservation easement, but it can't be located. Mr. Geer believes it highly likely that the CWA related to the 2005 transactions was lost or misplaced because of the excessive number of people reviewing and handling large numbers of documents during multiple government audits of Colorado Natural Land Trust transactions. Regarding the issues concerning Mr. Rodney Atherton's alleged conflict of interest in being both a donor of conservation easement property and a director of the charity, Mr. Geer stated Mr. Atherton did not vote on his own donations, although under cross-examination he did acknowledge Mr. Atherton's action in signing the Deed to transfer easement property to the Trust and by the same action acknowledging receipt of the property would be a conflict of interest. Mr. Geer believes it is significant that more than one-half of conservation easements donated to Colorado Natural Land Trust have been the subject of government audits. His belief is that the high number of audits indicates that the Trust has been treated more harshly than similar entities for no rational reason. The Court notes that Mr. Geer was uncertain regarding the preparation of a Baseline Report for the 2002 Conservation Easement, but was sure a Baseline Report was prepared for the 2005 Conservation Easement.

B. Defendant's Witnesses

27. Debra Van Wyke's testimony revealed that she is a tax conferee and manager of the conservation easement program. She received a B.A. from the University of Colorado, a Juris Doctorate from the University of Denver and an M.A. in Taxation from the University of Denver. Ms. Van Wyke presented a brief description of the management, review and mediation process that was employed by DOR during the pendency of the conservation easement tax credit reviews which are the subject of this action. Ms. Van Wyke testified that DOR acquires notice of the creation of conservation easements from information included in state income tax returns. DOR reviews approximately 2.5 million income tax returns each year and during the years 2002-2005 taxpayers claimed approximately 1500 to 1600 conservation easement tax credits. The testimony suggests that two (2) DOR tax examiners reviewed all income tax returns that claimed conservation easement tax credits associated with the return. Ms. Van Wyke referred to DOR Hearing Exhibit Q, a blank 8283 IRS Form, and stated the significance this form has in the DOR review process. This Court will later address many of the specific reasons Ms. Van Wyke testified the information provided on an IRS Form 8283 is critical to the DOR review process. She testified to the importance DOR places on "Baseline Reports", which are primarily relied upon by DOR to (1) determine the condition of the easement property at the time of donation, (2) establish the conservation purpose, and (3) assess the donee organization's ability to maintain the easement property in perpetuity and enforce the purposes of the easement. Ms. Van Wyke provided testimony regarding the creation of the Conservation Easement Oversight Commission (CEOC) and what impact its recommendations have on the review process DOR used to determine credit validity. She also discussed in some detail the importance of a CWA from the donee organization establishing acceptance of the donation of the conservation easement.

Plaintiffs' cross examination of Ms. Van Wyke focused on establishing their assertions that DOR did not provide them with a list of the reasons the CE tax credits were being challenged, but instead provided singular reasons delivered in a piecemeal fashion. A concise summary of Ms. Van Wyke's responses established that DOR's policy and procedure was to bring issues regarding validity to the attention of conservation easement donors on an item by item basis. Ms. Van Wyke did concede that if a resolution was reached as to a single issue, DOR would then focus on any other issues regarding validity, one item at a time. It is noteworthy that Ms. Van Wyke stated that it is likely DOR would not require a CWA if IRS Form 8283 was available because the information on Form 8283 would have provided the relevant information. The Court heard Ms. Van Wyke state that in the case of the easements at issue in this case, the CEOC recommended that DOR deny the conservation easements at issue in this case.

28. Natalie Barajas testified that she is employed by DOR and is a conferee assigned to approximately 60 conservation easement cases that were under review in the Fall of 2010 and Spring of 2011. She was assigned the conservation easement cases created by the Plaintiffs at issue here. Ms. Barajas stated she identified some potential problems with the Athertons' tax credits early in her review process. She stated the main problems she identified were (1) conservation purpose, (2) the impact on value of adjacently owned real estate the Athertons would retain after the creation of the easements (known as CFOP—contiguous family owned property), and (3) concerns addressed by CEOC. She testified she recalls getting the DOR Atherton file in November of 2010 and did not have any direct contact with Mr. Atherton until

August 25, 2011. While Ms. Barajas stated she may have contacted personnel at IRS asking for tax records related to the conservation easements, and may have asked IRS for any 8283 Form, her primary focus was on the issues of CFOP considerations on the value of the retained property. She stated that the time she devoted to the Atherton matter was limited because DOR wanted to see if the Athertons would file an appeal pursuant to new legislation (HB 11-1300).

29. Charles J. Hegarty was admitted as an expert real estate appraiser with special expertise in conservation easement appraisal procedures. Mr. Hegarty obtained an undergraduate degree in accounting from CSU in Ft. Collins, Colorado and a Master in Business Administration from the University of Denver. He has been a CPA and is currently a Certified General Appraiser in Colorado and has an MAI designation. He has 27 years of real estate appraisal experience and is under contract with DOR to assist in providing appraisal reviews and testimony in hearing regarding conservation easement matters. Mr. Hegarty opined that neither the 2002 or 2005 appraisals by Messrs. Peterson and Stewart meet the criteria necessary to be "Qualified Appraisals". The reasons relied on by Mr. Hegarty for this opinion regarding the Peterson/Shea appraisal are based on the appraisal's (1) failure to appraise the remaining contiguous family owned parcel (CFOP) which Mr. Hegarty asserts is a requirement in the regulations pertaining to this type of appraisal, (2) failure to use an objective "highest and best use" approach in arriving at fair market value and (3) failure to appropriately factor in the "basis rule". The reasons cited by Mr. Hegarty regarding the Stewart/Hunt appraisal relates primarily to the failure to factor in the impact on value of the retained land, commonly referred to as (CFOP) contiguous family owned property. In addition to the (CFOP) issue, Mr. Hegarty determined the hypothetical PUD was "extraordinary" and constituted a "false premise". Mr. Hegarty's testimony on the PUD issue is based on his belief that there was no showing by Plaintiffs that a future PUD on the land was either (1) legally permissible or (2) financially feasible. Mr. Hegarty stated that his research of similar property, located in proximity to the Plaintiffs' property, established sales in the $2.00 per square foot range, not the $8.00 per square foot used in the Stewart appraisal. Mr. Hegarty stated the subject property was not located in the City of Arvada at the time of the appraisal and no annexation or proper zoning for a PUD could have been more than speculation at the time of the appraisal.

The Court notes that on cross-examination Mr. Hegarty did acknowledge that he had not made anything more than a cursory review of the history or development of the subject and surrounding property. Mr. Hegarty did state that he had reviewed applications and filings for annexations and zoning of property in Arvada and Jefferson County during the time of the appraisal and was unable to establish any information that confirmed Plaintiffs contention that discussions with Arvada city personnel had been ongoing prior to and after the date of the appraisal. Mr. Hegarty did not waver in his opinion that the Stewart appraisal used a "Income-based approach" which was based on a false premise. Mr. Hegarty opined that the mere fact the Stewart appraisal, DOR Hearing Exhibit F at 10, makes reference to an income approach, a cost approach and a market approach, does not mean Mr. Stewart used all three approaches----it merely suggests he provided definitions of each approach.

C. Plaintiffs' Rebuttal Witnesses

30. The Plaintiffs' only rebuttal witness was Rodney Atherton. Mr. Atherton testified that Mr. Hegarty was in error on a number of matters related to the qualified appraisal issue. First, Mr Atherton disputed that the PUD matter was not a "legally permissible use". He stated that from the time he and Ms. Atherton purchased the property they had intended to develop it and had been involved in discussions with representatives from the City of Arvada about annexation and zoning. Mr. Atherton stated that storm water and development issues discussed by Mr. Hegarty were not legitimate issues affecting development and gave examples of storm water drainage and fire protection plans for the area.

He further stated the CFOP issues had been considered and addressed by both of the 2002 and 2005 appraisals. Some of Mr. Atherton's primary points related to his contention that, at the very least, Plaintiffs had "substantially complied" with all factors necessary to achieve a valid conservation easement. He further stated that he believed the testimony of Ms. Van Wyke, Ms. Barajas and Mr. Geer clearly established that Plaintiffs had been the subject of "selective enforcement" of rules and regulations by the DOR. Mr. Atherton asserted that the "selective enforcement" denied Plaintiffs "due process and equal protection" in DOR's process of reviewing the Plaintiffs' conservation easement tax credits.

ANALYSIS

The Colorado General Assembly defined and acknowledged conservation easements in 1975. § 38-30.5-101, C.R.S. However, it was not until 1999 that the Colorado General Assembly enacted legislation providing taxpayers with generous tax credits for the charitable contribution of such easements to a governmental entity or charitable organization. § 39-22-522, C.R.S. A state tax credit "...shall only be allowed for a donation that is eligible to qualify as a qualified conservation contribution pursuant to section 170(h) of the Internal Revenue Code..." and the associated federal regulations. § 39-22-522(2), C.R.S. In 2000, the General Assembly made these tax credits transferable, allowing a taxpayer to transfer all or a portion of the tax credit he originally claimed to another taxpayer to apply against her separate Colorado state income taxes. § 39-22-522(7), C.R.S. (2000). As relevant to this case, a taxpayer may claim a CE tax credit of up to $100,000.00 on a 2002 donation and may claim a tax credit of up to $260,000.00 on a 2005 donation. § 39-22-522(4)(a), C.R.S.

The first four issues of this analysis address whether the Plaintiffs adequately complied with the filing and recordkeeping requirements of the federal and state tax codes to render their 2002 and 2005 conservation easement tax credits valid as claimed. The last issue addresses Plaintiffs' due process concerns.

The Court determines that the concepts of an "appraisal summary" and a "qualified appraisal," as used in Treas. Reg. §1.170A-13(c)(3) and (4), were applicable at the time the Plaintiffs filed their income tax returns. The appraisal summary is required to be filed with Plaintiffs' state income tax return, while the qualified appraisal is a recordkeeping requirement, which must be produced upon the request of DOR, as explicitly provided by Colorado law. § 39-22-522(3), C.R.S.; Treas. Reg. § 1.170A-13(c)(2)(A), (B). In addition, the Court determines that

Colorado adopted federal recordkeeping requirements regarding the baseline report and contemporaneous written acknowledgement, in order for the taxpayers to substantiate that they qualified for the tax credit as initially claimed. Treas. Reg. § 1.170A-13(c)(2)(C).

I. Whether Plaintiffs filed a Federal IRS Form 8283, or other documents substantiating the information contained therein, to fulfill the summary of a qualified appraisal filing requirement of § 39-22-522(2) and (3), C.R.S.

As of December 27, 2002, the date of the 2002 CE donation by Plaintiffs, Colorado statute required a donor taxpayer to submit "a summary of a qualified appraisal, as defined in Treas. Reg. § 1.170A-13(c)(4)(1998) with the taxpayer's state income tax return. [1] § 39-22-522(3), C.R.S. (2002). Treas. Reg. § 1.170A-13(c)(4)(i)(a) requires the appraisal summary to be filed on "the form prescribed by the Internal Revenue Service." Although not specified in the regulation, IRS Form 8283 (Noncash Charitable Contributions) is the form referenced.

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[1] Of importance, Treas. Reg. § 1.170A-13(c)(4) defines a "summary of a qualified appraisal" as including the following:

> (i) In general…
> (A) Is made on the form prescribed by the Internal Revenue Service;
> (B) Is signed and dated…by the donee…;
> (C) Is signed and dated by the qualified appraiser….who prepared the qualified appraisal...; and
> (D) Includes the information required by paragraph (c) (4) (ii) of this section.
> (ii) Information included in an appraisal summary. An appraisal summary shall include the following information:
> (A) The name and taxpayer identification number of the donor…;
> (B) A description of the property in sufficient detail for a person who is not generally familiar with the type of property to ascertain that the property that was appraised is the property that was contributed;
> (C) In the case of tangible property, a brief summary of the overall physical condition of the property at the time of contribution;
> (D) The manner of acquisition (e.g., purchase, exchange, gift, or bequest) and the date of acquisition of the property by the donor...;
> (E) The cost or other basis of the property adjusted as provided by section 1016;
> (F) The name, address, and taxpayer identification number of the donee;
> (G) The date the donee received the property;
> (H) For charitable contributions made after June 6, 1988, a statement explaining whether or not the charitable contribution was made by means of a bargain sale and the amount of any consideration received from the donee for the contribution;
> (I) The name, address, and…the identifying number of the qualified Appraiser who signs the appraisal summary...;
> (J) The appraised fair market value of the property on the date of contribution;
> (K) The declaration by the appraiser described in paragraph (c)(5)(i) of this section;
> (L) A declaration by the appraiser stating that---
> (1) The fee charged for the appraisal is not a type prohibited by Paragraph (c)(6) of this section; and
> (2) Appraisals prepared by the appraiser are not being disregarded pursuant to 31 U.S.C. § 330(c) on the date the appraisal summary is signed by the appraiser; and
> (M) Such other information as may be specified by the form.

Treas. Reg. § 1.170A-13(c)(4)(i)-(ii).

The evidence is clear in the instant case that the Plaintiffs did not attach a Form 8283 to their 2002 tax return in which they claimed the $100,000 credit. At hearing, DOR demonstrated that Plaintiffs' failure to provide the information contained in a Form 8283 hampered its ability to assess whether the 2002 tax credit was valid as it was claimed. DOR witness, Ms. Van Wyke, testified that having the Form 8283 was critical to DOR because it represents the "one document" that provides DOR with a preliminary "fast track" for review of CE related tax returns.

Similarly, in 2005, Plaintiffs did not include a Form 8283 with their state income tax return where they claimed the $260,000 credit. Although other portions of the CE tax credit statute changed between 2002 and 2005, the summary of qualified appraisal requirement, as defined in Treas. Reg. § 1.170A-13(c)(4)(1998), remained intact. § 39-22-522(3), C.R.S. (2005).

The evidence supports that DOR's Form 8283 filing requirement conforms with applicable statutes, is not an unreasonable approach and has a legitimate government purpose. Plaintiffs' evidence and argument at trial focused on evidence that other documents had been filed with the 2005 tax return, including certain limited pages from the Appraiser's Report. However, the Federal Treasury Regulations provide that the information should be on the "form prescribed by the Internal Revenue Service. Treas. Reg. § 1.170A-13(c)(4)(i)(A). In addition, Ms. Van Wyke testified that during the period from 2002 through 2005, DOR reviewed approximately 2.5 million state tax returns each year. At a minimum, approximately 1500 to 1600 of these returns included CE tax credit issues. Ms. Van Wyke stated that generally two examiners reviewed all CE related returns during this period. The evidence is clear that DOR had a legitimate purpose in requiring that taxpayers submit important credit substantiation information, including CE summary appraisal reports, in a "reasonable form". Ms. Van Wyke demonstrated that DOR did not have adequate staff to sift through voluminous taxpayer documents in an effort to determine whether the taxpayer had complied with regulations and supplied the information necessary to render their tax credit valid as claimed.

The Plaintiffs testified during the trial that they always responded promptly to requests for information from DOR. While this may be true, Plaintiffs' argument misses the point as to why certain filing procedures and recordkeeping requirements are necessary. It would place an extraordinary burden on DOR if it must review extensive taxpayer records and must piecemeal together the required information from many different documents in order to determine whether the claimed credit is valid. This is clearly not a burden that the statutory scheme intended to place on DOR. This Court agrees with the Otero County District Court's findings in *Thompson v. Brohl* regarding the underlying policy and assumptions made by the Colorado General Assembly in enacting § 39-22-522(2), C.R.S. *See* Order Re: Validity of Easement, *Thompson v. Brohl*, Otero County Dist. Court Case No. 11CV0095, Jan. 22, 2013. Representative Spradley and other supporters of H.B. 99-1155 relied heavily on the concept of "self-policing" and enforcement between the taxpayer and donee organizations for the administration of the tax credit. It is clear from a review of the legislative history that the burden was placed on the private sector to prove its eligibility for the credit, rather than on DOR. *See* Background and Hearing on H.B.11-55: Before the House Agric., Livestock and Natural Resources, 62nd leg., 1st Sess. (Colo.1999) (Statement of Rep. Spradley, Member, H. Comm.).

However, even if DOR had the staffing to sift through voluminous documents, the evidence at trial established that Plaintiffs made no attempt to fulfill the summary of qualified appraisal requirement when they submitted their 2002 state income tax returns. Further, Plaintiffs' 2005 filing submissions will not satisfy Treas. Reg. § 1.170A-13(c)(4) because eight (8) of 17 information items were either wholly or partially missing.

II. Whether Plaintiffs' appraisals submitted in support of the 2002 and 2005 tax credits sufficiently meet the standards of a "qualified appraisal" as required under Treas. Reg. § 1.170A-13(c)(3) to move beyond the validity phase.

DOR maintains that Plaintiffs' 2002 and 2005 conservation easement tax credits are invalid because the associated appraisals were not a "qualified appraisal" under the relevant Treasury Regulations. Treas. Reg. § 1.170A-13(c)(2)(A). DOR identifies a number of deficiencies in Plaintiffs' appraisals, which it asserts disqualifies the appraisals for claiming tax credits. DOR Trial Brief ¶¶ 27-32, July 19, 2013. In particular, DOR asserts that the appraisals do not sufficiently specify a "method of valuation" and "basis for the valuation". Treas. Reg. § 1.170A-13(c)(2), (c)(3)(ii)(J)-(K). DOR also asserts that the appraisals fail to meet the contiguous family-owned property rule articulated in Treas. Reg. § 1.170A-14(h)(3)(i). Finally, DOR essentially maintains that the before-and-after valuation method used in the appraisals does not make an "objective" assessment of the highest and best use or fair market value of each property. Treas. Reg. § 1.170A-14(h)(3)(ii).

First, Treas. Reg. § 1.170A-13(c) states in part that "… [n]o deduction under section 170 shall be allowed… unless the substantiation requirements described in paragraph (c)(2) of this section are met…" Treas. Reg. § 1.170A-13(c)(1)(i). A "qualified appraisal" is a substantiation requirement of Treas. Reg. § 1.170A-13(c)(2)(i)(A) and its definition for the purposes of the requirement are set forth in subsection (c)(3).[2] The Second Circuit in *Scheidelman* found that the

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[2] The definition of "qualified appraisal" for purposes of the substantiation requirement is as follows.

> **(3) Qualified appraisal—(i) In general.** For purposes of this paragraph (c), the term "qualified appraisal" means an appraisal document that—
> (A) Relates to an appraisal that is made not earlier than 60 days prior to the date of contribution of the appraised property nor later than the date specified in paragraph (c) (3) (iv) (B) of this section;
> (B) Is prepared, signed, and dated by a qualified appraiser (within the meaning of paragraph (c) (5) of this section);
> (C) Includes the information required by paragraph (c)(3)(ii) of this section; and
> (D) Does not involve an appraisal fee prohibited by paragraph (c) (6) of this section.
> **(ii) Information included in qualified appraisal.** A qualified appraisal shall include the following information:
> (A) A description of the property in sufficient detail for a person who is not generally familiar with the type of property to ascertain that the property that was appraised is the property that was (or will be) contributed;
> (B) In the case of tangible property, the physical condition of the property;
> (C) The date (or expected date) of contribution to the donee;
> (D) The terms of any agreement or understanding entered into (or expected to be entered into) by or on behalf of the donor or donee that relates to the use, sale, or other disposition of the property contributed, including, for example, the terms of any agreement or understanding that—
> (1) Restricts temporarily or permanently a donee's right to use or dispose of the donated property,
> (2) Reserves to, or confers upon, anyone (other than a donee organization or an organization

purpose behind the appraisal reporting regulations is to provide "…the IRS with sufficient information to evaluate the claimed deduction and 'deal more effectively with the prevalent use of overvaluations'". *Scheidelman v. C.I.R.*, 682 F.3d 189, 198 (2nd Cir. 2012) (citations omitted).

In summary, various courts have concluded that an appraisal states a sufficient method and basis of valuation if (1) the appraiser identifies the valuation method used and the Court finds that it is an accepted means of valuing conservation easements under Treas. Reg. § 1.170A-13(c)(3)(ii)(J); and (2) the appraiser supplies various bases that were used for the valuation, such as IRS publications, tax court decisions, the appraiser's experience and the location of the subject property. *See e.g., Scheidelman*, 682 F.3d 189 at 195, 197 fn. 6, 198 (2nd Cir. 2012) (reasoning that "Commissioner's interpretation that an unreliable method is no method at all, goes beyond the wording of the regulation, which only imposes a reporting requirement"). However, the cumulative effect of defects in an appraisal which fails the majority of regulatory requirements can render the appraisal unqualified. *See Rothman v. C.I.R.*, T.C. Memo. 2012-218 (2012) (although *Rothman* and *Scheidelman* appraisals were substantially similar, on reconsideration, the tax court in *Rothman* identified additional defects that rendered the appraisal not qualified because it failed to satisfy 8 of 15 requirements).

Second, when determining the sufficiency of an appraisal, courts have established that "…whether the valuation was overstated, grossly or otherwise, is a factual question different from whether the formal procedural requirements were met, either strictly or under the 'substantial compliance' doctrine which may forgive minor discrepancies." *Kaufman v. Shulman*, 687 F.3d 21, 29 (1st Cir. 2012); *See also Scheidelman*, 682 F.3d 189 at 197 (in determining appraisal was "qualified", the Court reasoned that when "…gauging compliance with reporting requirement, it is irrelevant that the IRS believes the method employed was sloppy or inaccurate

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participating with a donee organization in cooperative fundraising) any right to the income from the contributed property or to the possession of the property, including the right to vote donated securities, to acquire the property by purchase or otherwise, or to designate the person having such income, possession, or right to acquire, or

(3) Earmarks donated property for a particular use;

(E) The name, address, and (if a taxpayer identification number is otherwise required by section 6109 and the regulations thereunder) the identifying number of the qualified appraiser; and, if the qualified appraiser is acting in his or her capacity as a partner in a partnership, an employee of any person (whether an individual, corporation, or partnerships), or an independent contractor engaged by a person other than the donor, the name, address, and taxpayer identification number (if a number is otherwise required by section 6109 and the regulations thereunder) of the partnership or the person who employs or engages the qualified appraiser;

(F) The qualifications of the qualified appraiser who signs the appraisal, including the appraiser's background, experience, education, and membership, if any, in professional appraisal associations;

(G) A statement that the appraisal was prepared for income tax purposes;

(H) The date (or dates) on which the property was appraised;

(I) The appraised fair market value (within the meaning of § 1.170A-1 (c) (2)) of the property on the date (or expected date) of contribution;

(J) The method of valuation used to determine the fair market value, such as the income approach, the market-data approach, and the replacement-cost-less-depreciation approach; and

(K) The specific basis for the valuation, such as specific comparable sales transactions or statistical sampling, including a justification for using sampling and an explanation of the sampling procedure employed.

Treas. Reg. § 1.170A-13(c)(3).

or haphazardly applied…"); *Estate of Evenchik v. C.I.R.*, T.C. Memo. 2013-34 (2013) (explaining that the tax court had previously found the requirements of Treas. Reg. § 1.170A-13 were "directory rather than mandatory" in *Bond v. Commissioner*, 100 T.C. 32 (1993)).

A. The 2003 Peterson Appraisal meets the requirements of a "qualified appraisal"

1. The appraisal meets the method of valuation requirement set forth in Treas. Reg. § 1.170A-13(c)(3)(ii)(J)

The 2003 Peterson appraisal uses the Sales Comparison Approach to assign a fair market value to the subject property before and after it is encumbered by the conservation easement donation. DOR Hr'g Ex. E 2003 Peterson Appraisal Company Appraisal ("Peterson Appraisal) at 43, Bates no. ATHERTON0000049. IRS Publication 561, which provides guidance to taxpayers on determining the value of donated property, acknowledges the comparable sales approach as an acceptable method of valuation. The publication states that "Because differences of opinion may arise between appraisers as to the degree of comparability and the amount of adjustment considered necessary for comparison purposes, an appraiser should document each item of adjustment." INTERNAL REVENUE SERVICE, PUBLICATION 561, Cat. No. 15109Q, DETERMINING THE VALUE OF DONATED PROPERTY (1994). The appraisal identifies comparable sales of properties before and after they are encumbered in its summary analysis and attaches specific information regarding each comparable sale property in the Addenda. Peterson Appraisal at 47-52, Bates no. ATHERTON0000053-58; Peterson Appraisal at 58-65, Bates no. 0000058-71. Although the direct sale of easements is the preferred approach for valuation in the Federal Treasury Regulations, if there is no substantial record of comparable sales, the before and after approach to valuing the easement is acceptable. Treas. Reg. 1.170A-14(h)(3)(i); *See*, *e.g.*, *Hughes v. Commisioner*, T.C. Memo. 2009-94 (2009). The appraisal contains a summary and table of the adjustments made to the before and after value of the subject property based upon similarities and dissimilarities in the comparable sales. Peterson Appraisal, Addenda at 77, Bates no. ATHERTON0000083- 122.

2. The appraisal meets the specific basis of valuation requirement set forth in Treas. Reg. 1.170A-13(c)(3)(ii)(K)

The appraisal studied 14 different properties throughout Colorado and this study was used to determine a percentage diminution in value due to the conservation easement. The appraisal determined that the easement contributed an 80% diminution in value to the property. A similar methodology analyzing diminution percentages in value on a nationwide scale was accepted by a tax court in *S.K. Johnston*. *S.K. Johnston v. C.I.R.*, T.C. Memo. 1997-475, at *18 (1997); *See also Simmons v. C.I.R.,* 646 F.3d 6 (D.C. Cir. 2011)*; Sheidelman v. C.I.R.*, T.C. Memo. 2013-18 (2013). The appraisal also considered contiguous family-owned property, as required in Treas. Reg. § 1.170(h)(3)(i), to the north of the subject property. It determined that the easement on the subject property provided no enhancement value to the 5.5 acre residential parcel by analyzing the scenic views from the residential parcel and reasoning that views were already obstructed by surrounding development. Peterson Appraisal at 65, Bates no. ATHERTON0000071.

The Court concludes that the appraisal sufficiently states a method and basis of valuation, meeting the minimum standards of a qualified appraisal for the purposes of determining the validity of the tax credit as it was claimed.

3. The appraisal contains an objective assessment of highest and best use of the subject property prior to restriction pursuant to Treas. Reg. § 1.170A-14(h)(3)(ii)

The appraisal determined that the highest and best use for the subject property before encumbrance was a one single family residential homesite. According to DOR's expert, an appraiser must evaluate four elements of highest and best use before and after considering the restrictions imposed by the easement. The appraiser must compare those uses that are legally permissible, physically possible, financially feasible and most productive. "In determining the before and after highest and best use, the fair market value of the property is not affected by whether the owner actually has put the property to its highest and best use." *S.K. Johnston v. C.I.R.*, T.C. Memo. 1997-475, at *18 (1997) (citations omitted). In addition, "[a] proposed highest and best use different from the property's current use requires the taxpayer to demonstrate 'closeness in time' and 'reasonable probability' of the proposed use." *Mountanos v. C.I.R.*, T.C. Memo. 2013-138 (2013) (citations omitted).

At the time of valuation, the property was being used as pasture for llamas and had no improvements aside from fencing and a small loafing shed. Peterson Appraisal at 34, Bates no. ATHERTON0000040. The 1.08 acre property was zoned A-2, Agricultural, by the Jefferson County Planning Department. Peterson Appraisal at 33, Bates no. ATHERTON0000039. A-2 zoning allows homesites to be developed on a minimum land area of 10 acres. The appraisal states that the property lies within the Mace Subdivision, which is divided into one acre homesites without requiring a change in zoning. Peterson Appraisal at 33, Bates no. ATHERTON0000039. Jefferson County's Zoning Resolution at Section 25(E)(1)(a) and Section 3(D)(2) confirm the appraisal's assessment of the legal permissibility of a single family home site on the subject property without County approval where certain conditions exist. Further, the appraisal discusses public utilities available in the area, access to the property and briefly states that it considered existing market conditions. It also mentions that the subject property is in an area experiencing significant demand for residential homesites with excellent views. Peterson Appraisal at 60, Bates no. ATHERTON0000066. The appraisal supports this assertion by maps and plats showing higher density subdivision development on nearby properties.

Finally, the appraisal describes the last deed of transfer as a Warranty Deed recorded June 14, 2002 for $180,000, which is the Atherton's basis in the unencumbered property. For various reasons, including a separate offer made for the property, the appraisal determines that the market value of the property at the time that the Plaintiffs acquired it was actually $195,000. The appraisal does not expressly provide the basis in the conservation easement itself, but it can be derived from the information given because it should bear the same ratio to the total basis of the property as the fair market value of the easement bears to the fair market value of the property before granting of the easement. *See* Treas. Reg. § 1.170A-14(h)(3)(iii).

4. The 2003 Peterson Appraisal meets 13 of 15 requirements of a "qualified appraisal"

The 2003 Peterson appraisal contains a thorough description of the subject property, with maps and legal description. Peterson Appraisal at 29, Bates no. ATHERTON0000035. A description of the physical condition of the property is explained throughout a variety of sections of the appraisal including those titled Physical Characteristics, Environmental Hazards, Utilities, Soils, Improvements and Photographs of Subject Property. Peterson Appraisal at 32-37, Bates no. ATHERTON0000038-43. The appraisal provides a summary of the terms of the agreement between the Plaintiff Grantors and the Grantee, Noah's Crib, as required by Treas. Reg. § 1.170A-13(c)(3)(ii)(D). The summary is not a complete recitation, but rather those terms that the appraiser found had the greatest effect on the highest and best use of the property and the value estimate. Peterson Appraisal at 55, Bates no. ATHERTON0000061. The name and address of the taxpayer and appraiser exist on the title page. The appraiser's identification number and summary of qualifications are also provided, as required by Treas. Reg. § 1.170A-13(c)(3)(ii)(E)-(F). Peterson Appraisal at Bates no. ATHERTON0000079-82. A statement that the appraisal was prepared for income tax purposes can be found under the section "Function of the Appraisal". Peterson Appraisal at 3, Bates no. ATHERTON0000009. The date of the appraisal was April 10, 2003 and the date of valuation was January 21, 2003, in compliance with requirements set forth in Treas. Reg. § 1.170A-13(c)(3)(i)(A) and (ii)(H). Peterson Appraisal at Bates no. ATHERTON0000002. There is a statement that the appraiser's employment and compensation is not contingent upon the reporting of a predetermined value or the amount of the value estimate. Peterson Appraisal at 71, Bates no. ATHERTON0000077.

The only element of Treas. Reg. § 1.170A-13(c)(3) that the Court finds is completely lacking is under subsection (ii)(C). That subsection requires that the date or expected date of contribution to the donee organization be provided in the appraisal. Although the appraisal mentions the contribution, it does not provide an express date. Where one substantiation element is lacking, it follows that Treas. Reg. § 1.170A-13(c)(3)(C) is not fulfilled because it requires the appraisal to provide all of the information listed in subsection (c)(3)(ii) of the section. However, the contribution date of the easement can be found on Colorado Form DR1305 and in the conservation easement deed itself. Therefore, the Court concludes that the 2003 Peterson Appraisal substantially complies with the substantiation requirements set forth in Treas. Reg. § 1.170A-13(c)(3) in order to move beyond the validity phase because the appraisal provides DOR with sufficient information to evaluate the claimed tax credit and deal effectively with the prevalent use of overvaluations.

The Court determines that questions as to the adequacy of an appraisal's valuation under Treas. Reg. § 1.170-14(h) should be addressed during Phase I valuation proceedings if the applicable substantive requirements of this section are considered in the appraisal and the tax credit is otherwise valid as claimed. The Court finds that the 2003 Peterson Appraisal expressly considers these requirements and supports its position with a sufficient analysis of the subject property and comparable sales to meet the minimum standard of a qualified appraisal. The Court finds that DOR's arguments regarding the adequacy of the appraisal's contiguous family-owned property and highest and best use analysis primarily go to the reliability of the valuation determined in the appraisal rather than whether the appraisal satisfied procedural substantiation requirements. Therefore, the Court finds that these particular issues should be addressed if this

case proceeds to the valuation phase and should not influence the validity of Plaintiffs' 2002 tax credits as claimed.

B. The 2005 Front Range Appraisal does not meet the requirements of a "qualified appraisal"

The Court finds that the cumulative effect of the defects in the 2005 Front Range appraisal discussed below deprives DOR of sufficient information to evaluate the tax credits claimed on Plaintiffs' 2005 Colorado Income Tax Return. *See Rothman v. C.I.R.*, T.C. Memo. 2012-218 (2012).

1. The appraisal does not provide an objective assessment of highest and best use of the subject property prior to restriction pursuant to Treas. Reg. § 1.170A-14(h)(3)

The Court determines that the 2005 Front Range Appraisal does not provide sufficient evidence demonstrating how immediate or remote the likelihood is that the subject property would in fact be developed for the purposes of Treas. Reg. § 1.170A-14(h)(3)(ii). DOR Hr'g Ex. F, Front Range Real Estate Consultants, Inc. 2005 Appraisal ("Front Range Appraisal"). The appraisal's highest and best use analysis is located on pages 79-82. After an analysis of what uses are legally permissible, physically possible, financially feasible and most productive, the appraisal concludes that the highest and best use of the subject property was for a 10-lot residential subdivision. DOR's expert appraiser disagrees stating the Plaintiffs' proposed Planned Unit Development ("PUD") was not legally permissible or financially feasible. The Court acknowledges that a variety of Tax Court opinions exist which determine a property's pre-easement highest and best use as the development of residential subdivisions despite a difference in the property's existing usage, zoning, access and infrastructure.[3] However, the Court finds that this appraisal lacks adequate support for its feasibility analysis and for its conclusion that the subject property had a high probability of being rezoned or obtaining local governmental approval for Plaintiffs' proposed PUD.

At a minimum, the appraisal should substantiate that the proposed subdivision meets the specific lot configuration and engineering standards in local subdivision regulations to support a conclusion that the subdivision approval will be granted. Here, the appraisal does not mention whether the PUD proposal was developed or created with the assistance of a land planner or engineer in order for it to be planned in accordance with local legally permissible uses. DOR's expert asserts that the PUD was not created with the assistance of an expert and Plaintiffs provided no expert testimony or evidence to the contrary. In addition, Plaintiffs provided no testimony at trial, and the appraisal does not provide any evidence, regarding the reasonable probability of the PUD's approval by local governmental authorities, such as letters and interviews from local officials or discussions of local land board meetings. Instead, the appraisal merely attaches local land use regulations in the addenda and makes a cursory statement that there are no known regulations which would adversely impact development on the subject property.

[3] *See e.g., Thayer v. C.I.R.*, T.C. Memo. 1977-370 (1977); *Kiva Dunes Conservation, LLC v. C.I.R.*, T.C. Memo. 2009-145 (2009).

2. The appraisal does not set forth a sufficient method and specific bases of valuation to satisfy the requirements in Treas. Reg. § 1.170A-13(c)(3)(ii)(J)-(K)

Moreover, the Court finds that the appraisal does not adequately identify the method it uses to determine the fair market value of the property. It deviates significantly from the traditional methods of valuation that it purports to be applying and therefore does not fulfill the "qualified appraisal" requirement. The appraisal states that it analyzes the value of the subject property by discussing three methods of valuation, the Cost Approach, the Direct Sales Comparison Approach and the Income Approach, on pages 85 through 119. The appraisal purports to reconcile all three approaches to come to its ultimate valuation conclusions for the before and after easement values of the subject property.

The appraisal makes the assumption that the property's highest and best use is for a 10-lot residential subdivision as provided in the attached PUD Plat. Under the heading "Cost Approach", the appraisal states that the Cost Approach is best utilized as a measure of project feasibility for a subdivision analysis and that the information from direct sales comparison analysis provides a better quantification of inherent property value for the retail lot derivation. Front Range Appraisal 86, Bates no. DORCE0207416. The appraisal then begins its analysis by valuing the "as is" condition of the property, comparing it to sales of other local properties with similar zoning and development potential. The appraisal concludes that "as is" the property's value as vacant land is 195,000 and $19,500 per residential lot. The appraisal proceeds to analyze the estimated infrastructure development costs, and based on local market data, it concludes that proper infrastructure for development would cost approximately $15,642 per lot. The appraisal's Cost Approach concludes that it would cost approximately $405,000 to prepare all 10 residential lots for development, including an entrepreneurial profit. Where the lot is vacant, the appraisal states that depreciation analysis is inapplicable. The appraisal then selects 5 sales of property which the appraiser finds to be the best comparable to the subject property. All of the comparable sales selected were single-family residential lots, located in platted subdivisions with infrastructure in place and zoned for low density residential development. None of the sales were adjusted to reflect current conditions that existed on the subject property, but instead were selected because they were similar to the subject property as it was proposed to be developed. Using the comparable sales of residential lots, the appraisal determines that the price per lot would be $92,000, multiplied by 10 for the total number of lots, for a total value of $920,000.

The appraisal analyzes the after easement restriction value of the property on pages 113 through 115 by using the comparable sale of a conservation easement in Larimer County, Colorado. Through this one direct sale comparison, the appraiser determined that there would be a 91% diminution in value to the subject property after it is encumbered with an easement that restricts all development rights. The appraisal concludes that the final value of the easement was $510,000. Front Range Appraisal 116, Bates no. DORCE0207446. In a subsequent analysis that purports to be an Income Approach analysis, the appraiser selects 6 more properties that it considers comparable to the subject property's absorption rate.

As acknowledged by DOR's expert, the appraisal's before easement valuation analysis as a whole contains many elements to support a variation of the Income Approach to valuation called

the Discounted Cash-Flow Analysis or the Subdivision Approach.[4] The appraisal considers that a detailed PUD plat had been created, it considers the time lag between the appraisal date and the amount of time for the subject property to be developed as proposed, it considers an absorption rate for the sale of the 10 proposed residential lots. The appraisal also analyzes direct and indirect costs of development of the subject property, estimates a developer's expected profit, and considers whether a discount rate should be applied. However, the appraisal never clearly articulates that the Subdivision Approach or the Discounted Cash-Flow Analysis is the valuation method being used, as would be required under Treas. Reg. § 1.170A-13(c)(3)(ii)(J). Rather, the elements of the Subdivision Approach can only be gleaned from the appraisal when one reads all of the valuation approach analyses together. The appraisal also fails to adequately explain the source of information used to derive the discount rates and absorption rates it applies. The valuation analysis of the property after the easement is similarly deficient in explaining the approach used and providing sufficient bases for the conclusion. Instead, the appraisal merely provides one comparable sale as support for a 91% diminution in value of the property.

For the reasons set forth above, the Court finds that the culmination of the 2005 Front Range appraisal's deficiencies makes the valuation analysis difficult to follow and burdensome to evaluate for whether overvaluation may have occurred. The Court finds that the qualified appraisal regulation's purpose was not achieved here because the cumulative effect of the defects in the 2005 Front Range Appraisal deprives DOR of sufficient information to evaluate the tax credits claimed on Plaintiffs' 2005 Colorado Income Tax Return. *See Rothman v. C.I.R.*, T.C. Memo. 2012-218, at *4 (2012).

Finally, the Court finds that insufficient evidence exists as to whether Plaintiffs' failure to obtain a qualified appraisal to submit with their 2005 income taxes was due to reasonable cause and not willful neglect, pursuant to I.R.C. § 170(f)(11)(A)(i) and (ii)(II). *See Rothman v. C.I.R.*, T.C. Memo. 2012-218, at *5 (2012). Testimony of Ms. Natalie Barajas demonstrated to the Court that she communicated with Plaintiffs and notified them of some of DOR's concerns with the appraisals.

III. Whether Plaintiffs lacked sufficient contemporaneous written acknowledgements ("CWA") from Grantee organizations substantiating the 2002 and 2005 CE donations, as required by Treas. Reg. § 1.170A-13(f).

In order to claim a charitable deduction of $250 or more, a taxpayer must obtain a "contemporaneous written acknowledgment" from the donee organization concerning the gift.[5]

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[4] There is a history of Tax Court support for using the discounted cash flow analysis in conservation easement valuation cases. *See, e.g.*, *Symington v. Commissioner*, 87 T.C. 892 (1986); *Stotler v. Commissioner*, T.C. Memo. 1987-275 (1987); *Clemens v. Commissioner*, T.C. Memo. 1992-436 (1992); *Schwab v. Commissioner*, T.C. Memo. 1994-232 (1994); *Kiva Dunes Conservation LLC v. Commissioner*, T.C. Memo. 2009-145 (2009).

[5] Treas. Reg. § 1.170A-13(f) specifies in detail the contents of a document intended to fulfill the CWA requirement:

> …(2) Written acknowledgment. Except as otherwise provided in paragraphs (f)(8) through (f)(11) and (f)(13) of this section, a written acknowledgment from a donee organization must provide the following information—
> (i) The amount of any cash the taxpayer paid and a description (but not necessarily the value) of

I.R.C. § 170(f)(8)(B); Treas. Reg. § 1.170A-13(f). In addition, I.R.C. § 170(f)(8) provides that no deduction shall be allowed unless the contribution is substantiated in accordance with the terms of that section. *See Averyt v. C.I.R.*, T.C. Memo. 2012-198, *4 (2012).

DOR asserts that Plaintiffs obtained no CWA from the Grantees in reference to the 2002 and the 2005 Deeds and therefore, Plaintiffs credits are invalid as claimed. Plaintiffs testified that they followed the Colorado state income tax return instructions prepared by DOR and that instructions fail to mention a CWA requirement. In addition, both Mr. Paul Geer and Mr. Rodney Atherton testified that documents exist that suffice as a "CWA", at least regarding the 2005 CE, but that those documents had been lost or misplaced through no fault of the Plaintiffs.

Testimony on behalf of the two Grantee organizations of the conservation easements confirms that Plaintiffs received no goods or services in exchange for the easement donation. The evidence suggests that Plaintiffs received a letter from the director of Noah's Crib on December 31, 2002. However, this document did not acknowledge receipt of the conservation easement, but only addressed Plaintiffs' other monetary contributions to Noah's Crib for 2002. *See* DOR's Hr'g Exhibit K. The most liberal reading of Exhibit K does not provide an inference that Plaintiffs fulfilled the CWA requirement. The Court also finds that the evidence does not support that such a CWA letter was issued by Noah Land Conservation regarding the 2005 conservation easement transfer.

Regardless of the reasons Plaintiffs and their witnesses offered regarding the "CWA" issue, it is undisputed that Plaintiffs produced no single document at hearing that meets the legal requirements of a CWA. Therefore, the Court evaluates Plaintiffs conservation easement deeds to determine whether Plaintiffs complied with the CWA requirement.

A. Plaintiffs' 2002 and 2005 conservation easement deeds do not sufficiently provide that no goods or services were received in exchange for their easement contribution

A contemporaneous written acknowledgment does not need to "…take any particular form…" and the requirement can be satisfied in many ways, including "…by letter, postcard, or computer-generated forms…" *Averyt*, T.C. Memo. 2012-198 at *3 (citing *Schrimsher v. Commissioner*, T.C. Memo. 2011-71 (2011)). In fact, courts have recognized that a taxpayer's conservation easement deed may fulfill the CWA requirement for a qualified conservation easement contribution. *Averyt*, T.C. Memo. 2012-198 at *5; *Simmons v. Commissioner*, T.C. Memo. 2009-208, *aff'd*, 646 F.3d 6 (D.C. Cir. 2011).

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any property other than cash the taxpayer transferred to the donee organization;
(ii) A statement of whether or not the donee organization provides any goods or services in consideration, in whole or in part, for any of the cash or other property transferred to the donee organization;
(iii) If the donee organization provides any goods or services other than intangible religious benefits (as described in section 170(f)(8)), a description and good faith estimate of the value of those goods or services; and
(iv) If the donee organization provides any intangible religious benefits, a statement to that effect…

The court in *Averyt* determined that the deed at issue qualified as a CWA where the deed (1) was "signed by a representative of the donee organization"; (2) provided a "detailed description of the encumbered property and conservation easement;" and (3) was "contemporaneous with the donation". *Averyt*, T.C. Memo. 2012-198 at *5, *6. In addition, the court found (4) that the deed as a whole provided no goods or services were received in exchange for the contribution because the deed stated the easement was an "unconditional gift," recited "no consideration received in exchange for it" and stipulated that the deed constituted "the entire agreement between the parties" with respect to the easement donation. *Id.*

Plaintiffs' 2002 CE deed is signed by Rodney C. Atherton and Ellyn R. Atherton as Grantors and by Randall Cornejo, as President of Noah's Crib, the Grantee organization. The CE Deed provides a legal description of the encumbered property per attached Exhibit "A". The signatures and recording of the document all occurred within the timeframe required to satisfy that the deed meets the "contemporaneous" requirement. *See* I.R.C. § 170(f)(8)(C)(ii) (defining "contemporaneous").

Plaintiffs' 2005 CE deed is signed by Ellyn R. Atherton as Grantor and by Paul Geer as President of Noah Land Conservation, the Grantee organization. The 2005 CE Deed provides a legal description of the encumbered property per attached Exhibit A. The signatures and recording of the document all occurred within the time frame required to satisfy that the deed meets the "contemporaneous" requirement. *See* I.R.C. § 170(f)(8)(ii) (defining "contemporaneous").

The issue then, is whether Plaintiffs' 2002 and 2005 CE deeds provide that no goods or services were received from the Grantee organizations in exchange for Plaintiffs' conservation easement donation. Plaintiffs' deeds recite that the "Grantor(s) intend "in consideration of the mutual promises and covenants contained herein, Grantor voluntarily grants and conveys to Grantee, and Grantee voluntarily accepts, a perpetual Conservation Easement in gross, immediately vested interest in real property…..for the purpose of conserving and forever maintaining the Conservation Values of the Property." The 2002 and 2005 CE deeds are for the most part identical, except that the 2005 individual Grantor is Ellyn R. Atherton. The deeds each recite the "consideration" as the "mutual promises and covenants contained herein [the CE deed] and Grantor voluntarily grants and conveys to Grantee, and Grantee voluntarily accepts, a perpetual Conservation Easement in gross……" Neither the 2002 nor the 2005 CE deed makes any reference to any sum of money being the entire or part of any consideration. The lack of reference to any monetary or other valuable consideration distinguishes the present case from the *Schrimsher* deed, which was held not to satisfy the CWA requirement. *Averyt*, T.C. Memo. 2012-198 at *5 ("In *Schrimsher*, the deed recited as consideration 'the sum of TEN DOLLARS, plus other good and valuable consideration.'") However, there is no clause in Plaintiffs' 2002 or 2005 CE deeds that provides it is the only, or "entire agreement," of the parties regarding the transaction. With the "entire agreement" clause, the *Averyt* court construed the deed as a whole and determined that the deed was sufficient to indicate no goods or services were exchanged for the contribution. *Id.* Here, the Court finds no clause in the CE deeds which would completely foreclose the possibility that goods or services were exchanged between Plaintiffs and the Grantee organizations with regard to the 2002 and 2005 contribution.

The court concludes that the Plaintiffs have failed to meet their burden of proof to show that they satisfied the CWA recordkeeping requirement for the 2002 and 2005 conservation easement donations.

IV. Whether Plaintiffs' baseline inventory reports supporting the 2002 and 2005 donations are sufficient to fulfill the recordkeeping requirements of Treas. Reg. § 1.170A-14(g)(5)(i)

The Court finds that a complete baseline report should, at a minimum, support monitoring of the conservation easement and comply with IRS recordkeeping requirements under Treas. Reg. § 1.70A-14(g)(5)(i). The Land Trust Accreditation Commission Guidelines and *Land Trust Standards and Practices* Practice 11B provide the Court with guidance on what elements may be included in the report, as follows:

1. Date of completion
2. Documentation of the conservation values and public benefits, including written descriptions along with related maps and photographs
3. Documentation of existing conditions that relate to the easement's restrictions and reserved rights, including written descriptions and related maps and photographs
4. Information on the location of the easement
5. Property description (an address is not sufficient; must be a full description)
6. Dated signatures of the landowner and land trust acknowledging that both attest to the accuracy of the information contained in the report
7. The land trust must have the baseline by the time of closing of the conservation transaction

In addition, Treas. Reg. § 1.170A-14(g)(5)(i)(D) provides that "…[t]he documentation, including the maps and photographs, must be accompanied by a statement signed by the donor and a representative of the donee clearly referencing the documentation and in substance saying 'This natural resources inventory is an accurate representation of [the protected property] at the time of the transfer.'."

Debra Van Wyke's testimony provided an explanation of the overall purpose behind the Baseline Inventory Report ("Report") and the reasons that DOR and donee organizations rely on it. Ms. Van Wyke stated that the Report records the important conservation values and the current conditions of the property. It supports whether the donated easement qualifies for tax benefits and substantiates the public benefit behind the easement donation by describing why the property is being conserved and documenting current conditions. It also operates as evidence in future litigation, if it meets court-specific rules for admissibility, and provides a foundation for future monitoring and enforcement activities. Finally, it enables donee organizations to identify worthwhile projects, to retain institutional knowledge and to communicate with landowners about stewardship responsibilities.

The Plaintiffs' maintain that both the 2002 and 2005 Baseline Inventory Reports are, at a minimum, in substantial compliance with all federal and state recordkeeping requirements. Plaintiffs' testimony on this issue intended to establish that DOR did not place much emphasis on the content of Baseline Inventory Reports, especially in 2002. The Court finds Ms. Van Wyke's testimony more credible when she stated that the Report is one of the few documents available to DOR, and all other parties to the conveyance, that establishes the purpose of the easement and ensures the purpose of the easement is carried-out in perpetuity.

This Court has examined the 2002 Baseline Report and finds that it does not contain items 6 and 7 above, nor does it comply with the mandatory Treas. Reg. § 1.170A-14(g)(5)(i)(D). DOR Hr'g Ex. M. The Court would further note that the 2002 Baseline Report contains items 1-5 above, but it finds that items 2 and 3 are barely sufficient to meet the minimum information necessary to carry-out the Report's purpose. The Court accepts the testimony of Plaintiffs' witnesses attesting to the donor's signature on Exhibit M as being that of Rodney Atherton and will further accept that any deficiency created by attaching pictures of the property some 3 months after the conveyance is not fatal to the Report.

The Court finds that the 2005 Baseline Report contains items 1-7 above. DOR Hr'g Ex. N. The dispute over the 2005 Baseline Report is that Defendant's Exhibit N is not signed by Plaintiffs and that the donee organization signing the document is not the correct party to the subject easement donation. Plaintiffs and Mr. Geer testified that they are certain that a complete and fully executed 2005 Baseline Report was prepared but had been lost, likely due to the number of times documents had been removed from files and copied for numerous audits. The Court finds that DOR's Exhibit N appears to be prepared by the party identified in Plaintiffs' testimony as Mr. Rodney Atherton's father. The Court finds that Exhibit N, in conjunction with the testimony of Plantiffs and Mr. Geer, provides sufficient indicia of reliability to support Plaintiffs' assertion that Exhibit N had the incorrect donee signature page attached to it by mistake and that the correct signature page did exist at the time of the transfer.

Although neither the 2002 nor the 2005 Baseline Reports contained the express phrase set forth in Treas. Reg. § 1.170A-14(g)(5)(D), the Court determines that the statements contained in the 2005 Baseline Report are adequate to satisfy this requirement. However, the same cannot be said for the 2002 Baseline Report.

Therefore, the Court concludes that the 2005 Baseline Inventory is adequate to satisfy the minimum recordkeeping requirements, but the Court rejects Plaintiffs assertion that the 2002 Baseline Inventory Report substantially complies with recordkeeping requirements because it is not supported by the evidence.

V. Whether DOR engaged in selective enforcement of its rules, regulations and interpretation of applicable state and federal law, thereby denying Plaintiffs due process and equal protection under the Colorado and United States Constitutions.

The Court first addresses whether or not the issues related to Plaintiffs' claim of "selective enforcement" and denial of "due process" and "equal protection" was properly plead and should be considered by this Court. The Court notes that a reading of the pleadings and the Case

Management Order does not refer to these claims. However, the Plaintiffs addressed these issues repeatedly during the Validity Hearing without objection by the Defendant. Therefore, this Court applies a "liberal interpretation" of C.R.C.P. 15(b) and will consider these issues to be included in Plaintiffs' claims because as they were raised during the hearing and because the claims do "conform to evidence" admitted at the hearing.

The Plaintiffs have maintained that DOR has been (1) vague in setting forth the requirements necessary to create a "valid" conservation easement and the resulting tax credits, (2) has been inconsistent in the application of the statutes, rules and regulations pertaining to creating "valid conservation easements and resulting tax credits and (3) have engaged in a practice of "selective enforcement" of the applicable statutes, rules and regulations concerning conservation easements and resulting tax credits.

Mr. Rodney Atherton stated that when he donated a conservation easement to Noah's Crib in 2002, § 39-22-522, C.R.S., and the regulations associated with claiming a tax credit were very basic and often vague. Mr. Atherton maintains that between 2002 and 2010, DOR's review process substantially evolved. Mr. Atherton stated that the efforts Plaintiffs made to comply with DOR's requirements resulted in "substantial compliance" with rules and regulations that were often lacking in detail, if not "vague". The Plaintiffs contend that the actions of DOR deprived them of both substantive and procedural due process.

Plaintiffs also maintain that the conservation easements they created were the subject of a "selective" enforcement process by DOR. Mr. Rodney Atherton, Mrs. Ellyn Atherton and Mr. Paul Geer testified to the large number of audits that were conducted on conservation easement donations made in favor of Noah's Crib, Noah Land Conservation and Colorado Natural Land Trust d/b/a Hunting for Purpose. Mr. Geer testified that he now manages about 281 conservation easement donations and that five or six appraisers did the majority of the appraisal work in support of the 281 conservation easements. Mr. Geer testified that between IRS and Colorado DOR audits, he was frequently required to gather 60 to 80 banker boxes of substantiation documents to support the tax credit claims associated with the easements.

Substantive due process requires that the substance of the law, regulation or governmental action is compatible with the Constitution. A law may violate substantive due process when it goes "beyond any proper sphere of governmental activity" Ronald D. Rotunda & John E. Nowak, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 14.6, at 672 (4th ed. 2007) (Rotunda); *People v. Young*, 859 P.2d 814, 818 (Colo.1993). Procedural due process guarantees that there is a fair adjudicative process before the government takes action depriving a person of life, liberty or property. The essence of due process is fair procedure, but no particular or perfect procedure is required so long as the elements of opportunity for hearing and judicial review are present. *Lamm v. Barber*, 565 P.2d 538, 546 (Colo. 1977).

The Plaintiffs support their contentions with testimony describing their relationship with the IRS and DOR. The Court has also heard testimony from Ms. Barajas and Ms. Van Wyke regarding DOR procedures in reviewing conservation easement tax credits. The testimony of these witnesses does partially support Plaintiffs' contention that the DOR review process has been evolving, particularly since 1999. However, the Plaintiffs have not produced any credible

evidence that supports their position that they have been "singled-out" by DOR and "subjected to more scrutiny" than other similarly situated taxpayers. The overwhelming evidence from DOR's witnesses leads to the conclusion that DOR was understaffed regarding the review of tax returns that included conservation easement tax credits and that this resulted in a more slow and lengthy review process. In the instant case, DOR witnesses, Barajas and Van Wyke, offered credible testimony as to the importance and implementation of DOR's document review process that was applied when examining Plantiffs' 2002 and 2005 conservation easement tax credit claims. The evidence does not establish that DOR's review process required Plaintiffs to meet a "higher" or "different" burden of providing documentation or explanation beyond what was required of other similarly situated taxpayers. Plaintiffs did not present any credible evidence showing that they were required to meet a different standard of compliance than other similarly situated taxpayers or that credit eligibility requirements established by the General Assembly and DOR lacked a statutory or regulatory purpose. "A tax statute is no different from any other statute and must be construed as a whole to give consistent, harmonious, and sensible effect to all its parts." *Jefferson County Bd. of County Comm'rs. v. S.T. Spano Greenhouse, Inc.*, 155 P.3d 422, 424 (Colo. App.2006) The interpretation of a statute or regulation by the agency charged with its administration is ordinarily accorded deference. *Stell v. Boulder County Dep't of Social Services*, 92 P.3d 910, 916 (Colo. 2004). "If it has a reasonable basis in law and is warranted by the record, a court will generally accept an agency's interpretation of the statute or regulations." *Stell*, 92 P.3d at 916.

The Court determines that Plaintiffs were neither denied due process nor equal protection of the law at any time during the DOR filing and review process. The statutes and regulations that govern Plaintiffs' creation of the conservation easements and tax credits were published in a manner sufficient to give Plaintiffs' notice and the opportunity to familiarize themselves with both the written statutes and regulations. Therefore, Plaintiffs are charged with having at the very least, constructive knowledge of them. Further, Plaintiffs' procedural due process rights were not violated because DOR provided, albeit slow, an adequate process of reviewing the denial of conservation easement tax credits. DOR not only provided adequate notice of its decision to deny Plantiffs' tax credits, but also provided a review and appeal process of its decision. The Court finds that testimony of Ms. Van Wyke and Ms. Barajas regarding DOR's conferee and appellate processes supports this conclusion.

Finally, the Court finds no substantial evidence to support the claim that Plaintiffs' substantive due process rights were violated.

***

The Court concludes that the Plaintiffs have failed to meet their burden of proof in this de novo proceeding and have **not** established by sufficient credible evidence that they met the requirements necessary to entitle them to the conservation easement tax credits they claim.

SUMMARY OF CONCLUSIONS OF LAW

The Court incorporates by reference the specific findings of fact, legal authority and legal conclusions set forth in detail in the body of this document. In summary, this Court makes the following Conclusions of Law:

I. Plaintiffs failed to file a Federal IRS Form 8283, or other documents substantiating the information contained therein, to fulfill the summary of a qualified appraisal filing requirement of § 39-22-522(2) and (3), C.R.S.

This Court finds that Plaintiffs **DID NOT** meet their burden to show that they timely filed a "summary of a qualified appraisal" with ither the 2002 or 2005 Colorado state tax returns as to the timely filing of a "summary of a qualified appraisal".

II. Plaintiffs' 2002 Appraisal sufficiently meets the standards of a "qualified appraisal" as required under Treas. Reg. § 1.170A-13(c)(3) to move beyond the validity phase. However, Plaintiffs' 2005 Appraisal did not meet the standards of a qualified appraisal.

This Court finds that Plaintiffs **DID** meet their burden to establish that the April 10, 2003 Peterson Appraisal substantially complies with the substantiation requirements that are relevant to review in the validity phase of this proceeding. Any question regarding the sufficiency of the 2003 Peterson Appraisal would be a matter that would be addressed in a Phase I valuation proceeding.

The 2005 Front Range Appraisal **DID NOT** meet the requirements of a "qualified appraisal". The "totality" or "culmination" of deficiencies in this appraisal produce a valuation analysis that is difficult to follow and burdensome to evaluate, especially as related to a determination of possible overvaluation. The qualified appraisal regulations purpose was not achieved, even substantially, and thus deprived DOR of the minimally sufficient information necessary to evaluate the 2005 tax credit claimed.

III. Plaintiffs lacked sufficient contemporaneous written acknowledgements ("CWA") from Grantee organizations to substantiate either the 2002 and 2005 CE donations, as required by Treas. Reg. § 1.170A-13(f).

The Court determines that neither the 2002 nor the 2005 CE deeds sufficiently establish the foreclosure of the possibility that goods and services were exchanged between the Plaintiffs and the Grantee organizations with regard to the 2002 and 2005 contributions. The Plaintiffs **DID NOT** meet their burden of proof since they failed to establish that they satisfied the CWA record keeping requirements for the 2002 and 2005 conservation easement donations.

IV. Plaintiffs' 2005 baseline inventory report is sufficient to fulfill the recordkeeping requirements of Treas. Reg. § 1.170A-14(g)(5)(i). However, the 2002 baseline inventory report is not sufficient.

The Court finds that Plaintiffs evidence established that the 2005 Baseline Inventory Report **DID** meet the minimum recordkeeping requirements of Treas. Reg. § 1.170A-14(g)(5)(i), but the 2002 Baseline Inventory Report **DID NOT** substantially comply with the requirement that the Baseline Inventory Report must contain a statement that states that the "natural resources inventory is an accurate representation of the protected property at the time of the transfer".

V. DOR did not engage in selective enforcement of its rules, regulations and interpretation of applicable state and federal law, which denied Plaintiffs due process and equal protection under the Colorado and United States Constitutions.

The Court determines that Plaintiffs **DID NOT** establish that they were denied due process or equal protection of the law at any time during the DOR filing and review process.

IT IS THEREFORE ORDERED THAT:

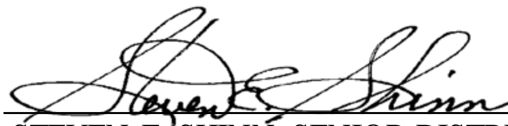
1. The Plaintiffs' appeal for relief as requested in their Complaint asserting that their 2002 and 2005 Conservation tax credit easements they claimed to be valid, IS DENIED; and

2. The Colorado Department of Revenue's determination that the conservation easements claimed to be validly created in 2002 and 2005 do not meet the requirements of the law as is necessary to support the granting of the challenged income tax credits is SUSTAINED.

3. Pursuant to § 39-22-522(2)(p), C.R.S. this order shall constitute a final judgment and is thus subject to appeal.

DONE THIS 3rd day of December, 2013.

BY THE COURT:



STEVEN E. SHINN, SENIOR DISTRICT JUDGE

COLORADO COURT OF APPEALS **2015COA59**

Court of Appeals No. 14CA0104
Jefferson County District Court No. 11CV4124
Honorable Steven E. Shinn, Judge

Rodney C. Atherton and Ellyn R. Atherton,

Plaintiffs-Appellants,

v.

Barbara Brohl, in her official capacity as Executive Director of the Colorado Department of Revenue,

Defendant-Appellee.

APPEAL DISMISSED

Division I
Opinion by JUDGE BOORAS
Taubman and Gabriel, JJ., concur

Announced May 7, 2015

Rodney C. Atherton, Pro Se

Ellyn R. Atherton, Pro Se

Cynthia H. Coffman, Attorney General, Eric T. Meyer, First Assistant Attorney General, Grant T. Sullivan, Assistant Solicitor General, Denver, Colorado, for Defendant-Appellee

¶ 1 Plaintiffs, Rodney C. Atherton and Ellyn R. Atherton, appeal from a district court order concluding that their 2002 and 2005 conservation easement tax credits are invalid. We dismiss the appeal because the district court's judgment is not final.

I. Background

¶ 2 In 2002 and 2005, the Athertons recorded conservation easement deeds regarding two parcels they own in Jefferson County. They accordingly filed income tax returns claiming conservation easement tax credits pursuant to section 39-22-522, C.R.S. 2014. The Department of Revenue (Department) disallowed the 2002 and 2005 claimed tax credits in 2007 and 2010, respectively, because the Athertons failed to satisfy state and federal requirements.

¶ 3 The Athertons protested the Department's disallowance of the tax credits and requested an administrative hearing. In 2011, before an administrative hearing took place, the Athertons appealed the Department's decision to the district court pursuant to newly enacted procedures set out in section 39-22-522.5, C.R.S. 2014.

¶ 4 The Department moved for summary judgment in district court, which the court denied. The district court then ordered that

the parties proceed to a "[t]hreshold hearing concerning the validity of [the Athertons'] 2002 and 2005 tax credits." After that hearing, the district court issued a detailed order in the Department's favor, concluding that the claimed credits are deficient in various respects, and thus are invalid. The district court limited its order to the validity of the credits, but nonetheless indicated in its order, pursuant to section 39-22-522.5(2)(p), that it "shall constitute a final judgment and is thus subject to appeal."

¶ 5 The Department filed a C.R.C.P. 59(e) motion to amend the district court's order, requesting that the district court fix the dollar amount that the Athertons owed the Department. The district court ultimately refused to do so, stating that any such dollar amount would have to be determined at a later phase in the proceedings.

II. Analysis

¶ 6 On appeal, the Athertons make four primary arguments. First, they contend that they substantially complied with the filing requirements and provided the information necessary for a Colorado Gross Conservation Easement Tax Credit. Second, they argue that their 2005 appraisal met the standards of a "qualified appraisal." Third, they maintain that the district court erred in

determining that they failed to satisfy the contemporaneous written acknowledgement requirement of the Internal Revenue Code. Fourth, they assert that the district court erred in determining that the baseline report for 2002 was insufficient.

¶ 7 The Department makes an initial argument that the district court's judgment may not be final because it establishes the Athertons' liability but fails to fix the dollar amount they owe, thus requiring additional district court proceedings. Because we agree with the Department that the order the Athertons appealed from is not a final judgment, we dismiss the case for lack of jurisdiction and do not reach the merits of the appeal.

Finality of Judgment

¶ 8 Without a final judgment, we lack jurisdiction to reach the merits of an appeal. *See Musick v. Woznicki*, 136 P.3d 244, 249 (Colo. 2006).

¶ 9 A final judgment or decision is "one that ends the particular action in which it is entered, leaving nothing further to be done to completely determine the rights of the parties." *Citizens for Responsible Growth v. RCI Dev. Partners, Inc.*, 252 P.3d 1104, 1106-07 (Colo. 2011). In the absence of a final judgment or decision, we

can only reach the merits of an appeal where a relevant statute or rule creates an exception to the finality requirement. *See, e.g., Paul v. People*, 105 P.3d 628, 631 (Colo. 2005) ("Except as expressly provided by statute or rule, appellate jurisdiction in Colorado is also generally limited to final judgments.").

¶ 10 It is clear that the order before us did not end the action in which it was entered, and was thus not a final judgment. By way of example, if we affirm the district court's ruling regarding the validity of the Athertons' conservation easements, we must still remand for the district court to determine the amount, if any, the Athertons owe the Department in back taxes and penalties. *See* § 39-22-522.5(2)(m)(II). Indeed, the district court itself acknowledged that additional proceedings need to take place to determine the amount, if any, that the Athertons owe the Department. Alternatively, if we reverse the district court's ruling regarding the validity of the conservation easements, we would still be required to remand the matter to the district court to assess, among other things, the value of the easements. *See* § 39-22-522.5(2)(m)(I).

¶ 11 Accordingly, because the judgment below is not final, the question that we must resolve is whether any relevant statute

creates an exception to the general rule, permitting us to consider the merits of this appeal despite a lack of finality.

¶ 12 The order that the Athertons appeal from is limited to the validity of the Athertons' claimed conservation easement tax credits. It was issued pursuant to section 39-22-522.5(2)(i). That subsection states:

> Following the court's order identifying the parties and consolidating cases and parties, *the court may hold a hearing to determine the validity of the conservation easement credit claimed pursuant to section 39-22-522* and to determine any other claims or defenses touching the regularity of the proceedings. The court shall determine whether the donation is eligible to qualify as a qualified conservation contribution. The court may set an expedited briefing schedule and give the matter priority on the docket. The court may order preliminary discovery, limited to validity of the easement credits and any other claims or defenses raised at this stage of the proceeding.

(Emphasis added.)

¶ 13 In turn, subsection (2)(m)(I)-(III) provides:

> After a determination pursuant to paragraph (i) of this subsection (2) of the validity of the credit as claimed, the court shall resolve all remaining issues as follows:

> (I) The first phase shall be limited to issues regarding the value of the easement.
>
> (II) The second phase shall be limited to determinations of the tax, interest, and penalties due and apportionment of such tax liability among persons who claimed a tax credit in relation to the conservation easement. The conservation easement tax credit action shall be final at the conclusion of the second phase as to the department of revenue and as to any taxpayer, transferee, or other party with regard to that party's tax credit dispute with the department of revenue.
>
> (III) The third phase shall address all other claims related to the conservation easement tax credit, including those between and among the tax matters representative, transferees, other persons claiming a tax credit in connection with the donation, and any third party joined as a party to the action. The department shall not be required to participate in or be a party to this third phase. Any participation in these proceedings by parties other than the tax matters representative, transferees, or other persons who have claimed all or part of a conservation easement tax credit is limited to this third phase.

Finally, relevant to our inquiry, subsection (2)(p) provides that

> [t]he district court shall enter judgment on its findings. The court shall have the authority to establish the amount of any deficiency and to waive or otherwise modify the amount of any

> interest, penalties, or other amounts owed. *The court shall indicate in any order whether the judgment of the court is a final judgment subject to appeal as to any party.*

(Emphasis added.)

¶ 14 Within the statutory scheme, we conclude that subsection (2)(m)(II), which is not at issue here, clearly creates an exception to the finality rule. Subsections (2)(i) and (2)(p), however, which are at issue here, do not create such an exception.

¶ 15 Specifically, subsection (2)(m)(II) states that "[t]he conservation easement tax credit action shall be final at the conclusion of the second phase as to the department of revenue and as to any taxpayer, transferee, or other party with regard to that party's tax credit dispute with the department of revenue." As we discuss below, that language suggests that the General Assembly created an exception to the finality rule with respect to phase two of the proceedings.[1] However, because that language specifically appears

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[1] In addition, language in subsection (2)(m)(II) authorizing the district court to "waive or otherwise modify the amount of any interest, penalties, or other amounts owed," also supports a conclusion that a tax credit validity determination cannot be appealed while phase two of the proceedings is still pending. A district court's decision to waive any penalty would likely impact a

in a single discrete subsection of the statute, and not in relation to the validity determination portion of the statute, it supports our conclusion that an appeal is not proper at this juncture. § 2-4-101, C.R.S. 2014 ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage.").

¶ 16 In comparison, subsection (2)(p) of the statute — the subsection relied upon by the district court to support its conclusion that the order on appeal here was final — states that "[t]he court shall indicate in any order whether the judgment of the court is a final judgment subject to appeal as to any party." That language, unlike language in subsection (2)(m)(II), does not expressly create an exception to the finality rule. Moreover, nothing in subsection (2)(i), concerning the validity of a claimed tax credit, suggests that a district court can depart from the finality rule.

¶ 17 Like subsection (2)(m)(II), and in contrast to subsections (2)(i) and (2)(p), a number of statutes and rules expressly permit appeals from nonfinal judgments. For example, C.R.C.P. 54(b) provides an exception to the general rule that an order must dispose of all

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party's decision to appeal a validity determination in the first instance.

outstanding matters before a final judgment subject to appeal can issue. *Harding Glass Co. v. Jones*, 640 P.2d 1123, 1125 (Colo. 1982) (C.R.C.P. 54(b) "creates an exception to the general requirement that an entire case be resolved by a final judgment before an appeal is brought."). That rule provides in relevant part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties *only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.*

C.R.C.P. 54(b) (emphasis added).

¶ 18 Additionally, section 24-10-108, C.R.S. 2014, concerning sovereign immunity, specifically states that a court's decision on a motion barring an action on sovereign immunity grounds "shall be a final judgment and shall be subject to interlocutory appeal." And section 13-4-102.1, C.R.S. 2014, concerning interlocutory appeals of determinations of questions of law in civil cases, requires a specific legal standard to be met before this court can permit an interlocutory appeal. First, the district court must certify "that

immediate review may promote a more orderly disposition or establish a final disposition of the litigation." § 13-4-102.1. Second, the order must involve "a controlling and unresolved question of law." *Id.*; C.A.R. 4.2; *see also* C.R.C.P. 107(f) ("For the purposes of appeal, an order deciding the issue of contempt and sanctions shall be final.").

¶ 19 With these statutes and rules in mind, we can glean nothing from subsection (2)(p) that expressly permits the district court to deviate from the general finality requirement by allowing a party to appeal from an initial validity determination while there is still at least one "phase" of the proceedings remaining.

¶ 20 And there is at least one trial phase that still needs to be dealt with in this matter. Because the district court made a determination that the Athertons' claimed conservation easements are invalid, and thus no conservation easement value determination is necessary, its next step is to proceed to the second phase of the proceedings, which requires determining "the tax, interest, and penalties due," among other things. § 39-22-522.5(2)(m)(II). The district court has acknowledged as much.

¶ 21 Accordingly, we dismiss the appeal.

JUDGE TAUBMAN and JUDGE GABRIEL concur.