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REAL ESTATE PRACTICE GROUP | APRIL 2016

## Otten Johnson Alert -

### Colorado's Troubled Conservation Easement Program Faces Lawsuit

Colorado statutes permit a landowner to grant a "conservation easement" affecting that landowner's real property. Once granted, a conservation easement allows the owner of the easement to prohibit or limit the use or development of the affected real property for a variety of purposes, including: maintaining the property in a natural, scenic or open condition; for wildlife habitat; for an agricultural, horticultural, wetlands, recreational or forest use consistent with preserving the land; or to preserve sites with historical interest.

Conservation easements may be granted to governmental entities, or to charitable entities qualified under Internal Revenue Code section 501(c)(3). The conservation easements must be perpetual unless otherwise stated, and must be recorded in the real property records.

The grantor of a conservation easement typically obtains an appraisal of the value of the easement (i.e., the value of the property without the easement in place, minus the value of the property as burdened by the easement). Then, the grantor deducts the value of the conservation easement for federal tax purposes (the donation must also qualify as a conservation contribution under Internal Revenue Code section 170(h)), and claims a Colorado state income tax credit. The Colorado conservation easement tax credits can, under most circumstances, be sold to third parties.

In March 2016, a group representing several hundred Colorado landowners sued the Colorado Department of Revenue in federal court in Denver, asserting that the State has mismanaged the conservation easement program, disallowing landowners' tax credits and causing them financial harm. Also named as defendants are the Colorado Division of Real Estate and the Colorado Conservation Easement Oversight Commission, among others.

The plaintiff group, Landowners United Advocacy Foundation, Inc. ("LUAF") claims that many landowners participated in the conservation easement program as "the only viable way to preserve their farming and ranching activities during trying economic times." LUAF alleges that in 2011, the Colorado legislature enacted a new mechanism for resolving challenges by the Department of Revenue to conservation easement donations. The Complaint further states that beginning in 2014, when the Department of Revenue began challenging conservation easement donations, it illegally applied the 2011 legislation retrospectively, disallowing donations made many years before. LUAF also says that the Department of Revenue unfairly challenged the appraisals that supported the tax credits claimed by landowners.

LUAF seeks (among other things) an injunction prohibiting the Department of Revenue and the other defendants from challenging conservation easements using certain methods, including the retroactive application of the 2011 legislation.

The defendants have a May 23, 2016 deadline to answer the Complaint in the federal court lawsuit.

In the most recent Colorado legislative session, two bills were proposed which would aid the landowners. One would have prevented the State from challenging the landowners' appraisals of the easements granted. The other would have prevented interest and penalties from accruing on easement tax credits which are later challenged by the State. Neither bill passed.

**Otten Johnson's attorneys have substantial experience with helping clients navigate business issues like those highlighted in this alert. For more information, or for help evaluating your current situation, contact any of the attorneys in the [Real Estate practice group](#).**

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