



***Comments on the Project Implementation Agreement
and Consequences for Reversal for the
Climate Action Reserve (CAR) Forest Project Protocol***

June 11, 2009

About Ecotrust

Ecotrust is a regional conservation organization based in Portland, Oregon. We believe that true economic prosperity arises from fully functioning ecosystems and vibrant communities and that every activity – whether building cities, transporting people and goods, making products, farming, or fishing – can and should be approached in a way that is profitable and good for the land and people. We believe the low-carbon economy, while requiring some challenging adjustments in the short term, will lead to a more prosperous region and higher quality of life: more efficient, more equitable, more self-sufficient, more robust, and more innovative.

General Comments

Contract negotiation

Ecotrust would like to see an accompanying description explaining the process involved in executing the Project Implementation Agreement (PIA). It is not clear how much flexibility CAR or the project proponent have in negotiating specific terms of this agreement. As an organization that works closely with landowners, we know that there are negotiations involved with any contract and it is important to understand the details of this process.

Since states, tribes, and federal agencies are all bound by different laws, it is clear that a single PIA could not be adopted that would serve all these groups. We hope that an effort will be made in the future to draft different model Project Implementation Agreements to serve each of these potential project participants.

PIA as Encumbrance

Requiring the PIA to be recorded on property records creates many challenges and costs for project participants. We hope that sufficient attention has been paid to the following issues that will result from this decision:

- 1) The subordination clause could require an additional subordination agreement to be negotiated between lenders and the landowner. It may be in the interest of CAR to draft a sample Subordination Agreement that landowners could use. This subordination negotiation will not only cost additional time and money, but it will also put the viability of the project into the hands of third parties that may not fully understand its details. Many financial institutions may choose not to subordinate to avoid risk and may be able to kill the project.
- 2) As with conservation easements, the PIA will survive after any transfer of ownership; however, there is a significant possibility that future owners of the property will not fully understand the implications, responsibilities, and costs of fulfilling its terms. The chance

of project failure in these conditions is extremely high and may create numerous legal challenges to the document's validity.

- 3) These agreements have not been tested in court and it may be difficult in some jurisdictions for the PIA to be upheld as a valid encumbrance. If a challenge is successful this precedent will threaten the viability of this instrument.
- 4) The role of enforcing the PIA will fall to CAR and it is critical that sufficient funds to take on legal challenges are in place. We recommend that CAR develop an enforcement endowment to ensure that the legal validity of these documents is upheld to prevent a successful challenge to the validity of the PIA or to specific potential violations.

Specific comments

4. Monitoring Rights of the Reserve – The current language requires a minimum of five business days' notice prior to performing site visits to verify carbon stocks on the forest site. Many landowners will not feel that this is sufficient. There are many instances, such as landowner travel or difficulty contacting a landowner, where this length of time will not prove adequate. We recommend general language that would require "reasonable prior notice" before site visits. However, if CAR determines that this general language is not sufficient, we would recommend at least two weeks' notice prior to any site visit.

6. Reserve's Remedies – There is currently no mention of the enforcement costs involved with challenges to terms of the Project Implementation Agreement. There are clear details of how a notice of breach is to be communicated, and the description of how a breach of agreement will be treated as an Intentional Reversal; however there is no mention of who bears the costs of investigating a possible breach. CAR may want to consider a clear statement of who would bear the costs of investigating possible violations prior to arbitration or court action. This is an issue that may differ according to the legal requirements of individual states or tribes.

Two other topics have not been treated in this agreement: 1) insurance requirements and 2) liability of CAR or third party verifiers under CERCLA or other environmental legislation.

Insurance: There is no mention of insurance that would cover individuals performing a site visit, so it is unclear whether this topic was considered in the process of drafting the Agreement. For many organizations, any contract that involves working on a specific property requires some type of insurance that would cover those groups while they are on the site. Given that many sites may have active logging operations during the verification process, it is in the interest of the Reserve to at least consider this subject in the PIA.

Environmental Legislation: Given the strict interpretations of many environmental laws such as CERCLA (Comprehensive Environmental Response, Compensation, and Liability), it may be in the interest of the Reserve to specifically state that they are not an owner, operator, or responsible party that could be liable under the terms of this legislation as a result of this Agreement.

Consequences of Reversal

Ecotrust does not feel that Improved Forest Management projects should be the only type of Forest Projects that could suffer additional penalties for early termination. In our opinion, it is sufficient for any group that terminates a project prior to the 100 year requirement to pay back 100% of the credits received rather than a worst case scenario of 140%. There is not currently any indication that these types of projects are more likely to have a reversal than other forest projects.