

May 11, 2009

Climate Action Reserve
523 W. Sixth Street, Suite 428
Los Angeles, CA 90014

**Re: Comments on the Updated Forest Project
Protocol Public Draft (April 15, 2009)**

The undersigned attorneys and organizations are pleased to have the opportunity to comment on the current Public Draft of the proposed update to the Climate Action Reserve's Forest Project Protocol. Thank you and the Protocol work group for your dedicated effort in producing this new version.

We will direct our comments to the portions of the Protocol that address the permanence of credited emissions reductions, and, in particular to the use of conservation easements and deed restrictions to provide added reduction of certain risks to ensuring this permanence, as defined in the Protocol.

Section 3.3 Project Implementation Agreement, p. 6

Appendix C Determination of the Buffer Pool Contribution for Forest Projects, pp. 65 - 71

In the second paragraph, first sentence, of Section 3.3 and again in Section C.6, first paragraph, second sentence, conservation easements and "any deed restriction" are used on par with one another as a means to reduce risk additionally to that achieved by the Project Implementation Agreement.

It is our opinion that a deed restriction, in general, will do little to mitigate the risk of reversals to carbon stocks from changes in management, ownership or land use; and that a deed restriction cannot be equated with a conservation easement in this regard. As detailed in the following, unlike conservation easements, deed restrictions are unlikely to bind future landowners to assure the continuance of the carbon project activity.

"Deed restriction" is a generic term for a covenant or other servitude that limits the allowable uses of a property. For example, a deed restriction might limit future construction on the property to a single family home or specify portions of the property that cannot be developed.

Deed restrictions will "run with the land," that is, they will automatically bind future owners of the restricted property, *only* if they comply with a variety of formal legal requirements for the creation of servitudes. Most important in the present context is the requirement that the restrictions benefit a specific parcel or parcels of real property. As an example, consider a restriction that prohibits construction of any structure that would cast shade onto an adjoining property. The adjoining property owner could enforce the restriction against future owners of the restricted property because the restriction provides a clear benefit—access to sunlight—to the plaintiff's property.

By contrast, restrictions with benefits “in gross”—benefits that do *not* accrue to a specific parcel or parcels—will not run with the land. *See, e.g., Marra v. Aetna Constr. Co.*, 15 Cal. 2d 375 (1940); *Chandler v. Smith*, 170 Cal. App. 2d 118 (1959); *Martin v. Ray*, 76 Cal. App. 2d 471 (1946); Cal. Civ. Code § 1468. For instance, in *Greater Middleton Ass'n v. Holmes Lumber Co.*, 222 Cal. App. 3d 980 (1990), the court held that a deed restriction prohibiting logging was enforceable by neighboring property owners against a subsequent owner because the restrictions identified “dominant and servient tenements,” i.e., properties respectively benefitted and burdened by the restriction. *Id.* at 992-94. The court rejected the defendants’ argument that the restriction failed to benefit any property. *Id.* at 994. **Therefore, a deed restriction that benefits the Climate Action Reserve, a buyer of Carbon Reduction Tons, or another party other than the project landowner would have benefits “in gross” and would not run with the land.**¹

In response to this traditional limitation on the enforceability of deed restrictions, California and some other states legislatively established special categories of deed restrictions that will run with the land though they do not benefit identifiable parcels. Conservation easements are one category of such restrictions. *See* Cal. Civ. Code § 815.1. The benefits of a conservation easement are almost always “in gross”: they benefit the entity that holds the easement and the public generally, rather than a specific parcel of property.

“Environmental covenants” represent another legislative exception to the rule. They are restrictions on the use of property contaminated with hazardous materials, such as a restriction that the property will not be used for residential or other uses that could bring people into contact with residual contamination. *See* Cal. Civ. Code § 1471.²

Accordingly, one of the primary differences between a conservation easement and a run-of-the-mill deed restriction is the power of the former to bind successor landowners without a connection to the benefitted property. Further, the grantee of a conservation easement is an entity established to monitor and enforce these instruments, with statutorily enabled remedies for enforcement and restoration of damaged values. Conservation easements are also subject to their own requirements, such as perpetual duration, the existence of a “purpose . . . to retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition,” and the limited group of entities that may hold the easements. *See* Cal. Civ. Code §§ 815.1, 815.2(b), 815.3. These limitations would prevent most ordinary deed restrictions from being considered de facto conservation easements.

¹ If the deed restriction benefitted another parcel owned by the project landowner it might run with the land, but would be of dubious value to the protection of the permanence of the emissions reductions as there would be no separation of interest to ensure enforceability of the covenant.

² Another example of a form of deed restriction that may function to reduce the risk to permanence if appropriately drafted is a recorded “offer to dedicate” and associated covenants contained in a grant agreement between the landowner and the State of California or other governmental agency that could fund the protection of a privately-owned property in fee. This instrument could potentially function as an effective limitation on land use changes, given the enforcement powers of the government.

