August 11, 2011

Steve Cliff
Chief, Climate Change Program Evaluation Branch
cliff@arb.ca.gov

Rajinder Sahota
Manager, Climate Change Program Operation Section
rsahota@arb.ca.gov

California Air Resources Board
1001 I Street
Sacramento, CA 95812

Dear Steve and Rajinder,

We commend the Air Resources Board (ARB) on significant improvements throughout the cap-and-trade regulation and appreciate your efforts to respond to stakeholder concerns.

Van Ness Feldman (VNF), EcoAnalytics, Finite Carbon Corporation (Finite), and the American Carbon Registry (ACR) – collectively referred to below as the "Coalition" – are submitting these joint comments on the new language in §95973 and §95975 related to Tribal lands as potential participants in the offsets program. Some of our organizations have submitted or will submit comments separately on other portions of the regulation. Our joint comments address only the Tribal lands language.

Our four organizations are actively working with Native American Tribes to overcome barriers to Tribal participation in carbon offset markets. We have extensive experience working for and with Tribes on forestry, energy, carbon, and Tribal sovereignty issues. While we can understand ARB's desire to ensure enforceability of Offset Project agreements on Tribal lands, we believe the new language in §95973 and §95975 will effectively exclude Tribal lands from participating in the offset program, for the reasons we explain below. Since we do not believe this is ARB's intent, we would like to provide recommendations for proposed alternate language, as well as suggest further stakeholder consultation and targeted outreach to Tribes. We offer our Coalition as a resource for such consultation. Following our comments on the regulation, we describe briefly the Coalition and its current efforts.

§95973(d)(3): non-Tribally-owned lands within the borders of Indian lands

Subsection 95973(d) requires that "Land that is owned by any person, entity or tribe within the external borders of such Indian lands" must demonstrate the existence of a limited waiver of sovereign immunity between ARB and the governing body of the Tribe. There are two ways to interpret "external borders of such Indian lands." Since the term "Indian lands" uses the definition at 25 USC §81(a)(1), which defines the term to mean Tribally owned lands, the most literal interpretation would be that it is referring to lands owned by parties other than Tribes (persons and entities) that are surrounded by Tribal lands. However, the use of the tem "external borders" implies the section is referring to land owned by any person, entity or Tribe located within the boundaries of the Tribe's reservation, since the word "borders" is usually used in connection with the borders of a reservation. This second interpretation would make the most sense.

However, regardless of which way this provision is interpreted, as written it does not make legal sense. As discussed below, it will require landowners who are not Tribes but who are persons or entities owning land on reservations, to obtain a limited waiver of sovereign immunity from the Tribe. However the Tribe would have no control over such lands, would not be a party to any Offset Project on those lands, and may not even have governmental jurisdiction over such lands. As a result, (1) the waiver of sovereign immunity by the Tribe would have no legal effect, and (2) the Tribe would refuse to grant a waiver in a situation where it does not have jurisdiction.

There are three kinds of land ownership on most reservations: 1) land owned by Tribes, 2) land owned by individual Indians and held in trust by the United States, and 3) land owned in fee by non-Indians. The Tribe has no ownership of the latter two categories of land, has no jurisdiction over non-Indian owned land, and has minimal jurisdiction over the use of individual Indian owned land because of its trust status. As a result, the Tribe would have no involvement in a decision by an individual Indian or non-Indian landowner to put his or her land into an Offset Project. For this reason, there is nothing in connection with the Offset Project over which the Tribe would be waiving its immunity. It would therefore correctly refuse to provide such a waiver, and thus the provision as written would have the effect of excluding all non-Indian and individual Indian owned lands within reservations from participating in Offset Projects. Further, there are no legal barriers to ARB suing such land owners, so the section is unnecessary.

ARB thus does not need a waiver of sovereign immunity to enforce carbon agreements against such persons or entities, since such persons are susceptible to suit in courts of competent jurisdiction in the same manner as any other person or entity. As a result, this subsection is both unnecessary and will have the effect of excluding all non-Tribally owned land within the external borders of Indian lands from participating in ARB offset projects.

For these reasons, we recommend that subsection 95974(d)(3) be removed from the regulation and the requirements on Tribal limited waivers of sovereign immunity should be limited to land owned by Tribes.

§97975(l)(1): Consent to suit in State Courts

Section 95975(l)(1) requires that the governing body of a Tribe must enter into a limited waiver of sovereign immunity and "This waiver must include a consent to suit by ARB and the State of California, in the courts of the State of California, with respect to any action in law or equity commenced by ARB or the State of California to enforce the obligations of the Tribe with respect to its participation in the Cap-and-Trade program, irrespective of the form of relief sought, whether monetary or otherwise."

However, pursuant to long-standing U.S. Supreme Court decisions, Tribes in most states lack the legal authority to consent to be sued in state courts. In *Kennerly v. District Court of the Ninth Judicial District of Montana et. al*, (400 U.S. 480 (1971)), the Court held that only Congress has the authority to give state courts jurisdiction over Tribes. In 1953, Congress enacted what is commonly known as Public Law 280, giving states the right to assume civil and/or criminal jurisdiction over Indians in their states. That law was amended in 1968 to require Tribal consent before a state could assume such jurisdiction. While California is a "280 state"; that is, a state that used the authority of the 1953 Act to assume state court jurisdiction over Tribes and Indians living on a reservation in California, its authority extends only to tribes and Indians in California. A few other states also assumed authority through P.L. 280, but doing so gave the courts in that state civil jurisdiction over the Indians in that state; it did not give California courts jurisdiction over Indians in those states. The Supreme Court made in clear in *Kennerly* that these statutes are the only ones in which Congress has granted to states the authority to assert jurisdiction over reservation Indians or Tribes and that without such authority, even consent by a Tribe or an individual Indian living on a reservation to be sued in state court is invalid.

As a result, under the modified text of the regulation, only Tribes and Tribal members in California will be able to consent to be sued in California state courts, such that this provision will exclude the vast majority of Tribes from participation in carbon offset programs. Even if the regulation provided for the Tribe to agree to jurisdiction in the state courts in the state in which the Tribe is located, only a few states assumed jurisdiction under P.L. 280. (No state has assumed jurisdiction pursuant to the 1968 Act because no Tribe is willing to give its consent.) As a result, even with that change, the provision would exclude most Tribes in the United States, and in particular, it would exclude most Tribes with significant forest land holdings and potential for Forest Offset Projects.

There are, however, other ways for ARB to secure the obligations that Tribes enter into as part of Offset Projects. Many Tribes and the parties with which they are entering into multi-million dollar business agreements provide that any disputes will be resolved through arbitration, with access to the Federal courts under the Federal Arbitration Act to enforce the arbitration provisions.

There are other possible ways for ARB to ensure Tribes comply with their Offset Project agreements. Rather than try to spell all of those out in the regulation, we recommend that ARB provide a generic obligation on the part of Tribes to be bound, with the specifics worked on a case-by-case basis. Under this approach the language in §95975(l)(1) and (2) could be replaced with:

"For projects on Tribal lands, the governing body of the Tribe must agree to such provisions as are necessary to ensure the terms of the Offset Project are enforceable. ARB will work with each Tribe on a case-by-case basis to develop enforceable terms that are also consistent with the law on Tribal jurisdiction as established by the courts and Congress."

Our coalition is eager to work with ARB to help identify the legal options for obtaining enforceable agreements with Tribes. As indicated, this does not require breaking new ground since Tribes have entered into numerous commercial and other agreements involving billions of dollars in which the other party has been able to obtain the security it needs to invest its money or resources with the assurance that it has adequate rights and forums in which to enforce those rights. Tribes cumulatively own over 18 million acres of forest land. By providing flexibility for Tribes in this manner, ARB will enable this forest land to contribute to carbon reduction without sacrificing ARB's appropriate concern that Offset Agreements be fully enforceable.

§95975(l)(3): Proof of federal approval of Tribe' participation

Subsection §95975(l)(3) notes that "For offset projects located on Indian lands, as defined in 25 U.S.C. §81(a)(1), the Tribe must also provide ARB with proof of federal approval of the Tribe's participation in the requirements of the Cap-and-Trade Program."

ARB is correct in requiring that any Offset Project agreement be approved by the Department of Interior in its capacity as trustee of Indian land. However, to our knowledge, the Department has yet to establish a policy on such approvals, which could delay its action on such approval indefinitely. Our coalition urges ARB to work with us and other involved groups to educate the Department of Interior about the carbon market and the importance of developing a policy for acting on Offset Project agreements entered into by Tribes and by individual Indians whose land is held in trust by the United States.

Description of CIG-funded Tribal carbon coalition

In June 2011, the US Department of Agriculture (USDA) announced $9 Million in funding under the 2011 Conservation Innovation Grant (CIG) Greenhouse Gas grant program. The Confederated Tribes of the Colville Reservation, in partnership with EcoAnalytics LLC, a carbon finance advisory firm, the law

firm of Van Ness Feldman, and forest carbon project developer Finite Carbon, was one of only nine grantees awarded under this competition.

The Colville Tribe's project, entitled *Adaptation of Forest Carbon Protocols to Include Tribal Lands,* received $1.226 million in federal funding toward the $2.45 million overall cost of the project, with the remaining coming from a combination of a cash match by Finite Carbon and EcoAnalytics and in-kind contributions from all of the participants. The award received represents the second highest amount awarded to any of the nine recipients.

The CIG Greenhouse Gas round requires all funded projects to register on a "commonly recognized carbon registry," listing the American Carbon Registry, Chicago Climate Exchange (CCX), Climate Action Reserve (CAR), and Voluntary Carbon Standard (VCS).[1] Therefore the grant partners plan to modify existing ACR improved forest management (IFM) protocols to address Tribal lands, forest management practices, and Tribal sovereignty/federal trust responsibility concerns, and to create a new ACR IFM Protocol for Tribal Lands. Simultaneously, the grant partners are considering working with other standards including CAR, Gold Standard and VCS to explore potential for voluntary offset projects on Tribal lands.

Under this innovative granting mechanism, this CIG team will:

- Address the legal and institutional barriers to the monetization of carbon offsets by Indian Tribes.
- Assist federal agencies (USDA and Department of Interior – Bureau of Indian Affairs) in making climate and energy policy decisions as they relate to carbon offsets within the context of Tribal concerns and help develop a framework for policy that would make future policies developed more consistent and equal to private landowners.
- Pilot an analysis of the value to the Tribe of a forest carbon project on the Colville Reservation under which Tribal foresters and Tribal decision-makers will receive detailed training on how to evaluate the pros and cons to the Tribe of entering the carbon offset market. (Under the grant, the Tribe has no obligation to actually enter that market, just to evaluate its value to the Tribe).
- Help all Tribes better understand the commercial opportunities for carbon offset project development.

The overall goal is to help make carbon offsets on Tribal lands competitive with those created on private lands, and to remove barriers to entry for Native American Tribes interested in accessing eco-asset markets. Specific goals of this project are to:

- Address issues at the federal level regarding Tribal sovereignty as it relates to long-term land tenure and greenhouse gas rights.
- Adapt previously approved forest carbon methodologies and protocols relating to reforestation, improved forest management, and avoided conversion to Tribal lands.
- Establish a forest carbon evaluation pilot project on Colville land so that foresters can better understand carbon quantification and the value of sequestered emissions and so that Tribal leaders can develop the expertise to make the best possible decisions for their Tribal members on the role forest carbon sequestration should play on their reservations.

[1] Recently re-branded the Verified Carbon Standard.

- Establish a Colville Tribal consulting company that can share its capabilities (e.g. fee-for-service) in establishing carbon projects on Tribal lands across the country.

We believe our coalition represents an important resource for ARB as you work to tailor regulatory solutions to enable Tribal participation in the offset program under the Cap-and-Trade Regulation. We believe it is also crucially important that ARB conduct further stakeholder consultation and targeted outreach to Tribes to ensure that ARB is not inadvertently creating barriers to Tribal participation. We offer our coalition as a means to facilitate such outreach, while certainly not suggesting we should be your sole resource. It is important to consult Tribes throughout the country if ARB hopes to have participation of Tribes nationwide in the offset program.

Stakeholder consultation will already be occurring under our CIG grant – not merely with the Colville Tribe, but via the open stakeholder processes run by the voluntary carbon programs. ARB is already familiar with ACR's protocol approval process, from your consideration of ACR offset protocols. As you know this includes internal review by Winrock and ACR carbon experts, a stakeholder consultation step in which the protocol author is required to respond to all stakeholder comments, and an expert peer review step in which the protocol author again must respond to comments from leading experts in the field. This process will take place when we submit an IFM Protocol for Tribal Lands to ACR for approval. ARB will have access to all the outputs from the process, since ACR puts a priority on full transparency and posts all stakeholder and peer review comments, and the protocol author's responses, publicly.

Thank you for your consideration of these comments and for your commitment to implementing the strongest possible Cap-and-Trade program in California. Please do not hesitate to contact any of the Coalition representatives if you should have questions or require further information.

Sincerely,

Daniel S. Press
Van Ness Feldman
dsp@vnf.com
(202) 298-1882

Tiffany McCormick Potter
Managing Director
EcoAnalytics
Potter@ecoadata.com
(415) 362-3000

Scott Nissenbaum
President
Finite Carbon Corporation
snissenbaum@finitecarbon.com
(484) 586-3094

Nicholas Martin
Chief Technical Officer
American Carbon Registry
Nmartin@winrock.org
(703) 842-9500

Van Ness Feldman
Founded in 1977 and now with over 90 professionals in Washington, D.C. and Seattle, WA, Van Ness Feldman provides strategic business advice, legislative and policy advocacy, legal and regulatory compliance counsel, representation in administrative proceedings and litigation, and support for project development, permitting, and transactions in the inter-related areas of energy, the environment, natural resources, public lands, health care, and infrastructure. Van Ness Feldman has been representing Indian tribes, Alaska Native Corporations (ANCs) and private sector companies doing business with tribes and ANCs for 30 years. The firm assists tribes and energy companies develop successful business relationships, assists ANCs on land conveyance and other issues arising under the Alaska Native Claims Settlement Act and the Alaska National Interest Lands Conservation Act, serves as Washington counsel to tribes and ANCs, negotiates rights-of-ways, leases and other permits for energy-related activity on reservations, assists tribal/ANC firms and private sector companies use the special 8(a) rights Congress has provided to tribes and ANCs, and assists tribes and intertribal organizations assert the special employment rights Congress has provided to Indians and Alaska Natives.

Daniel Press, who heads the Van Ness Feldman Native American practice group, has been engaged in the practice of Indian law since 1968. Over that period he has represented numerous tribes, Alaska Native Corporations, intertribal organizations, and tribally-owned enterprises. The scope of his practice has included virtually every area of Indian Law – energy, land, health, business development, education, agriculture, trust funds and assets, employment and labor law, and environmental remediation. Mr. Press also represents companies engaged in business with tribes, with a particular emphasis on energy companies seeking to build generating stations, wind energy project, pipelines, and similar projects on reservation lands.

EcoAnalytics
EcoAnalytics provides businesses insight into the creation, evaluation, and monetizing of carbon offsets, renewable energy, mitigation and endangered species banking, and water and nutrient trading projects and portfolios. The company specializes in creating analytical tools and services and is adept at understanding key constraints and hazards in eco-asset credit delivery and project development that are fundamental for mitigating project and portfolio risks. Our strength is our ability to help their clients monetize eco-assets and environmental market equity level investments around the world. EcoAnalytics, LLC is headquartered in San Francisco, California and has an office in Washington DC. EcoAnalytics was seeded and co-founded by Lee West, Chairman of the San Francisco Carbon Collaborative (SFCC). Mr. West co-founded the SFCC when tasked by the City of San Francisco Office of Economic and Workforce Development to bring low carbon and clean technology companies to San Francisco, similar to the way Silicon Valley attracted the internet industry.

Tiffany McCormick Potter co-founded EcoAnalytics with 15 years of experience in carbon markets, environmental law and policy, and forestry science. She was formerly Vice President of Equator's EcoProducts Fund, a $100 million private equity fund for environmental markets. As Head of Origination, she managed environmental-asset origination efforts and managed aspects of carbon and environmental-asset transactions, project development, and policy development. She was formerly senior analyst for Point Carbon, where she launched a first-of-kind trading analytics tool for North American carbon markets used by major banks, hedge funds, and branches of US Government.

Finite Carbon Corporation
Finite Carbon is a leading U.S. forest carbon development company, providing a single-source solution for creating and monetizing carbon credits. Combining unparalleled project-development experience with extensive carbon market knowledge, Finite offers the most comprehensive forest carbon project development and commercialization service in the United States. Our unique end-to-end solution for landowners provides quick access to carbon markets. With an in-house team of forest carbon experts who are industry leaders with demonstrated experience in each step of the forest carbon project cycle, Finite

offers the expertise and resources for successful implementation of forest carbon inventories, protocol selection, project design, verification management and monetization of carbon credits.

Scott Nissenbaum, President of Finite, served for three years as the lead investor and chairman of the board for ImageTree Corporation, a company with patented platform technology and a proprietary process that provides accurate and consistent assessment of forest resources to improve forest management and financial performance. This experience led him to recognize forest landowners' need for a single-source forest carbon development company that facilitates entry into emerging carbon markets. In addition to his knowledge of the forestry industry, Scott also brings to Finite Carbon a background in finance. He has a B.S. degree in finance from Pennsylvania State University and an MBA in finance from St. Joseph's University. Scott spent more than a decade as a venture capitalist in the Philadelphia area with Novitas Capital. As president of Finite Carbon, he was responsible for assembling the management team and oversees the daily operations of the company.

American Carbon Registry

The nonprofit American Carbon Registry (ACR), an enterprise of Winrock International, is a leading carbon offset program recognized for its strong standards for environmental integrity. Founded in 1996 as the GHG Registry by Environmental Resources Trust, ACR has 15 years of experience in the development of rigorous, science-based carbon offset standards and methodologies as well as in carbon offset issuance, serialization and transparent online transaction and retirement reporting. As the first private voluntary GHG registry in the world, ACR has set the bar in the global voluntary carbon market for offset quality and operational transparency and continues to lead innovation. ACR worked with Finite Carbon Corporation to release in 2010 the first improved forest management (IFM) methodology designed for U.S. commercial timberlands, which will serve as the basis for the proposed ACR IFM Protocol for Tribal Lands.

Nicholas Martin, ACR's Chief Technical Officer, spearheads the development and approval of all new carbon protocols for ACR. He has experience in forest and agricultural carbon, renewable energy, biomass and biofuels, electric power sector GHG mitigation, and policy analysis and policy design for GHG cap-and-trade systems, working for Winrock International and Xcel Energy. Nicholas also has 7 years' experience working with Native American Tribes on forestry and fisheries. He created and managed the Zuni Forest Products & Services Enterprise at the Pueblo of Zuni and spearheaded forest health and hazardous fuel reduction partnerships with the US Forest Service, Bureau of Indian Affairs, Bureau of Land Management, and State of New Mexico. He earlier worked in fisheries management for the Columbia River Intertribal Fish Commission.