



Guidance Note on the Ability of Program Entity to Transfer Title to Emission Reductions

Version 1
January 2018

**Guidance Note on the Ability of Program Entity to Transfer Title to Emission
Reductions (ERs)
Forest Carbon Partnership Facility, Carbon Fund
January 2018**

I. Requirements on Program Entity’s ability to transfer Title to ERs

The Carbon Fund (Carbon Fund) of the Forest Carbon Partnership Facility (FCPF) requires a Program Entity to demonstrate its ability to transfer Title to Emission Reductions (ERs), in accordance with the Carbon Fund Methodological Framework (June 22, 2016) (hereinafter “Methodological Framework”). The term ‘Title to ERs’ has been defined in the Methodological Framework to mean “full legal and beneficial title and exclusive right to ERs contracted for under the [Emission Reductions Payment Agreement (ERPA)].”¹ Specifically, Indicator 36.2 of the Methodological Framework requires that the Program Entity “demonstrates its ability to transfer to the Carbon Fund Title to ERs, while respecting the land and resource tenure rights of the potential rights-holders, including Indigenous Peoples (i.e., those holding legal and customary rights, as identified by the assessment conducted under Criterion 28), in the Accounting Area.” Indicator 36.3 of the Methodological Framework also specifies that the Program Entity needs to demonstrate its ability to transfer Title to ERs before signing the ERPA, or at the latest, before transferring of ERs to the Carbon Fund.

Further, Section 15.01(a) of the General Conditions Applicable to ERPAs for FCPF Emission Reductions Programs (November 1, 2014) (hereinafter “General Conditions”) provides that “[t]he Program Entity shall ensure throughout the [term of the ERPA] and in accordance with the Methodological Framework that the Program Entity has the ability to transfer Title to ERs to the Trustee, free of any interest, [e]ncumbrance or claims of a Third Party other than in accordance with the ERPA.”

II. Evidence to demonstrate Program Entity’s ability to transfer Title to ERs

Indicator 36.2 of the Methodological Framework provides three options through which the Program Entity could demonstrate its ability to transfer Title to ERs: (1) reference to existing legal and regulatory frameworks; (2) reference to sub-arrangements with potential land and resource tenure rights-holders (including those holding legal and customary rights, as identified by the assessment conducted under Criterion 28 of the Methodological Framework); and (3) reference to the benefit sharing arrangements under the Benefit Sharing Plan.

However, this list of options is neither exhaustive nor are these three options mutually exclusive. The Program Entity can demonstrate its ability to transfer Title to ERs through any combination of the three

¹ The Methodological Framework further states that “[i]t is important for the Trustee to ensure that the ERs acquired by the Carbon Fund are free of dispute and the legal title to the ERs is transferred to the Trustee in accordance with the ERPA. However, the definition relates to the ERs only. In particular, it does not entail any rights, titles or interests to land and territories.”

options or may even provide other evidence appropriate for the REDD Country’s specific legal context, acceptable to the International Bank for Reconstruction and Development (World Bank), acting as trustee of the Carbon Fund (Trustee). In any case, the Program Entity is encouraged to supplement the evidence submitted with relevant court decisions, legal opinion by legal experts who are familiar with the REDD country’s regulatory system, agreements between the Program Entity and certain stakeholders, just to name a few. However, it should be noted that the Program Entity must have prepared a Benefit Sharing Plan in accordance with the Methodological Framework prior to signing the ERPA.

Box 1 below provides a few guiding questions to consider under the three listed options. This list of guiding questions is not intended to be an exhaustive list, but an illustrative one to help the Program Entity identify the most relevant information needed to demonstrate its ability to transfer Title to ERs. Annex 1 provides more detailed guidance.

Box 1. Guiding Questions on how to Demonstrate Ability to Transfer Title to ERs	
Option 1: Reference to existing legal and regulatory frameworks	<p>Does the REDD County have legal instrument(s) (e.g., statutes, regulations, decrees, administrative orders) that stipulate that the Program Entity has (1) the Title to ERs, and/or (2) the authority to transfer Title to ERs generated under the ER Program?</p> <p>Does the REDD County have legal instrument(s) (e.g., statutes, regulations, decrees, administrative orders) that provide a basis for the land and resource tenure holders to claim interests in the Title to ERs?</p>
Option 2: Sub-arrangements with potential land and resource tenure rights holders	<p>Has the Program Entity entered into any sub-arrangements (e.g., contracts, agreements, payment for ecosystem services schemes) that could be the basis for potential land and resource rights holders to claim interests in the Title to ERs?</p> <p>Have the potential land and resource tenure rights holders willingly, expressly, and validly agreed, through the sub-arrangement(s), that the Program Entity will be the only seller of the ERs, or that the Program Entity may sell the ERs on their behalf?</p>
Option 3: Benefit sharing arrangement	<p>Has the Program Entity prepared a Benefit Sharing Plan in accordance with the Methodological Framework?</p> <p>How has the design of the Benefit Sharing Plan incorporated considerations on land and resource tenure rights (including legal and customary rights of use, access, management, ownership, etc.), and Title to ERs? In particular, have potential land and resource tenure rights holders been included in the list of beneficiaries under the Benefit Sharing Plan? Does the Benefit Sharing Plan require beneficiaries to register with the benefit sharing mechanisms in return for an authorization of the Program Entity to transfer Title to ERs?</p>

III. The due diligence review by the World Bank

The World Bank will carry out a due diligence review to assess if and to what extent the Program Entity has demonstrated its ability to transfer Title to the ERs to be generated under the ER Program within the Accounting Area. The due diligence review will be based on a desk review of the evidence submitted by the Program Entity on a *prima facie* basis², assuming the evidence submitted is complete, accurate, and true. The World Bank will undertake this due diligence review at different stages of the ER Program, i.e., before ERPA signature, before ER Title transfer, and if the ER Title is contested, after ER Title transfer (Figure 1).

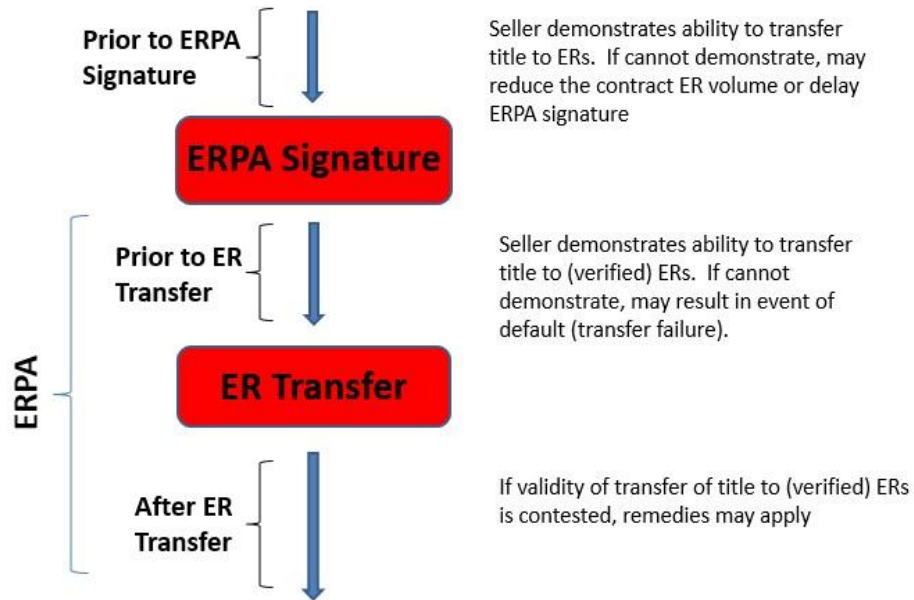


Figure 1. Key stages of an ER Program where the Program Entity needs to demonstrate its ability to transfer Title to ERs

IV. Corrective actions and remedies in case of inability to transfer Title to ERs or Title Contest

The Program Entity is expected to demonstrate its ability to transfer Title to ERs prior to ERPA signature. In the event that the Program Entity fails to do so, in full or in part, ERPA signature may be postponed or the ER Contract Volume may be reduced accordingly.

Upon ERPA signature, Section 15.01(a) of the General Conditions requires that “[t]he Program Entity shall ensure throughout the [term of the ERPA] . . . that the Program Entity has the ability to transfer Title to ERs to the Trustee, free of any interest, [e]ncumbrance or claims of a Third Party...,” and to demonstrate its ability to transfer Title to ERs prior to each ER Transfer.

² The term ‘prima facie’ means that the provided evidence will be assessed by the World Bank “at first sight” and be accepted as complete, accurate and true until proven otherwise.

Following each Reporting Period, the Program Entity must report in its ER Monitoring Report any “inability, in full or in part, to transfer Title to ERs to the Trustee” or “any Title Contest by any Contesting Party,”³ how and to what extent the Program Entity has resolved such inability or Title Contest, and “any remaining inability to transfer Title to ERs or any remaining Title Contest” (see General Conditions, section 15.01(b)). In reporting a Title Contest, the Program Entity should identify the Contesting Party, provide a detailed description of the nature of the contest, and describe the area in the Accounting Area that is affected by such contest, and how the Program Entity has endeavored to resolve such Title Contest. Together with the ER Monitoring Report, the Program Entity “shall also provide the Trustee with documentary and other evidence demonstrating the Program Entity’s ability to transfer to the Trustee Title to ERs regarding ERs that have been generated during the preceding Reporting Period” (see General Conditions, Section 15.01(b)).

Prior to an ER Transfer, if the Trustee determines that the Program Entity has failed to demonstrate its ability to transfer Title to ERs, in full or in part, the Trustee will determine the amount of Contract ERs and/or Additional ERs that are affected by such failure following consultations with the Program Entity. In this case, the Program Entity shall not transfer and the Trustee shall not be obligated to accept the transfer of and make payment for such affected Contract ERs and/or Additional ERs (see General Conditions, Section 15.01(c)).

If there is a Title Contest regarding the previous transfer of Title to ERs, in consultation with the Program Entity, the Trustee will determine a “reasonable time period” for resolving such Title Contest (see General Conditions, Section 15.01(d)). If the Program Entity and the Contesting Party cannot resolve the Title Contest during this time period, the Trustee will assess whether the Title Contest may have any merits on a *prima facie* basis. If the Trustee finds that the Title Contest may have merit, it will calculate the amount of ERs affected by such contest in consultation with the Program Entity, and notify the Program Entity and the Buffer Manager of such amount (see General Conditions, Section 15.01(d)) (Figure 2).

³ The term ‘Title Contest’ is defined in the General Conditions as “an event in which a Contesting Party contests the validity of any past or future transfer of Title to ERs, free of any interest, encumbrance or claim of a Third Party other than in accordance with the ERPA, from the Program Entity to the Trustee during the [term of the ERPA].”

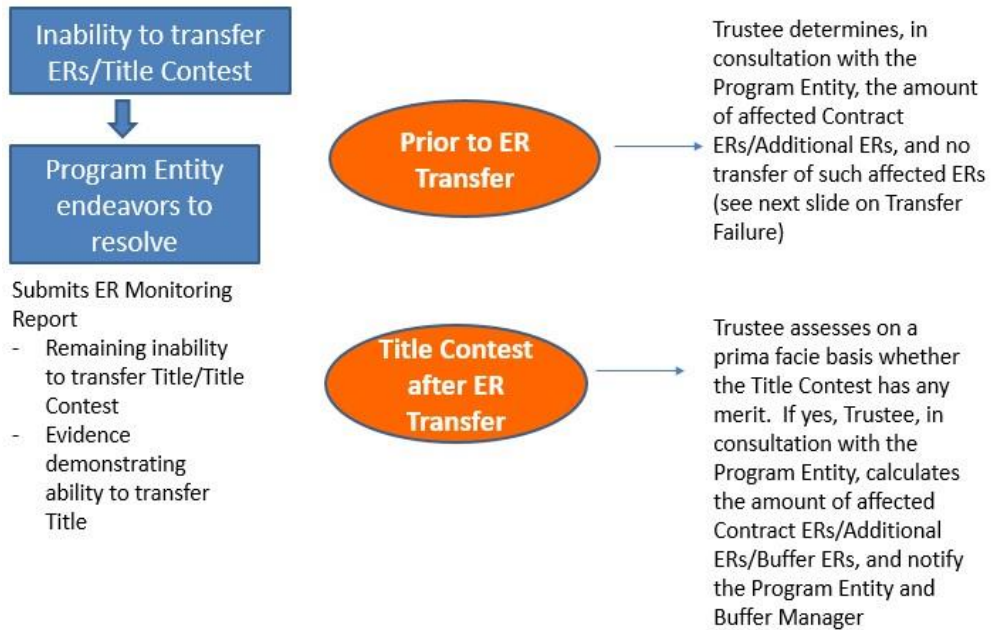


Figure 2. Corrective actions in case of inability to transfer Title to ERs or Title Contest

The inability to transfer Title to ERs (prior to any ER Transfer) may result in an Event of Default as it may prevent the Program Entity from transferring the agreed Contract ER amounts for a given Reporting Period (Transfer Failure) (General Conditions, Section 16.01(a)(i)). In addition, the occurrence of a Title Contest (after any ER Transfer), as determined by the Trustee pursuant to Section 15.01(d) of the General Conditions, and failure by the Program Entity to ensure, within 90 calendar days following the Trustee’s determination of the occurrence of a Title Contest, that the transfer of Title to ERs regarding any Contract ERs and/or Additional ERs previously transferred to the Trustee under the ERPA remain unaffected by such Title Contest, may also result in an Event of Default (Title Transfer Failure) (General Conditions, Section 16.01(a)(iii)). In the event of a Transfer Failure or a Title Transfer Failure, the Program Entity has either (i) 90 calendar days to cure the Event(s) of Default, or (ii) if the Trustee requests, agree on and implement an Action Plan during a certain time period to cure the Event(s) of Default (General Conditions, Section 16.02). If the Program Entity fails to cure the Event(s) of Default to the reasonable satisfaction of the Trustee, the Trustee may terminate the ERPA, and recover from the Program Entity any outstanding Advance Payment amount, if any (Figure 3).

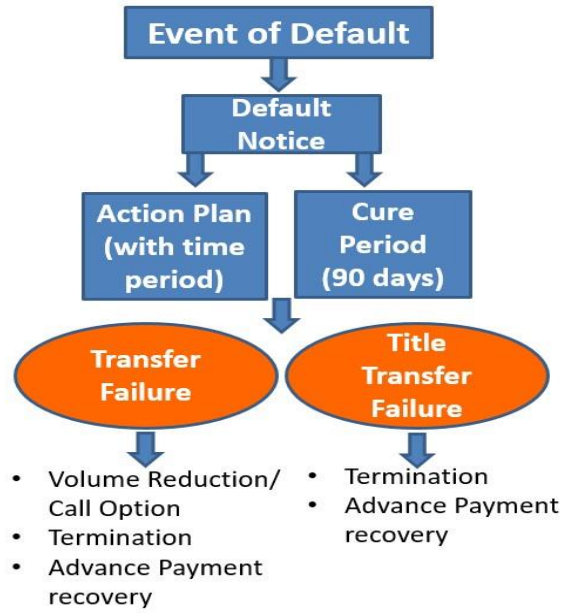


Figure 3. Remedies of the Trustee in case of an Event of Default by the Program Entity

Annex 1. Guidance on submission of evidence to demonstrate the Program Entity's ability to transfer Title to ERs

Option 1: Reference to existing legal and regulatory frameworks

Guiding Question: Does the REDD County have legal instrument(s) (e.g., statutes, regulations, decrees, administrative orders) that stipulates that the Program Entity has (1) the Title to ERs, and/or (2) the authority to transfer Title to ERs generated under the ER Program?

Guiding Question: Does the REDD County have legal instrument(s) (e.g., statutes, regulations, decrees, administrative orders) that provide basis for the land and resource tenure holders to claim interests in the Title to ERs?

- Describe the type of legal instrument (e.g., statutes, regulations, decrees, administrative orders, court decisions) and its legal effect (e.g., To what extent is the legal instrument enforceable and legally binding and on what parties, or is it aspirational that requires further rule-making or promulgating guidelines to clarify the responsibilities of various parties? Does the scope of the legal instrument cover the ER Program Accounting Area?).
- Identify the entity responsible for implementing/enforcing the legal instrument.
- Provide an overview of how the legal instrument was drafted, reviewed, and adopted to confirm if the legislative or rulemaking process was transparent, consultative, and respective of the interest of land and resource tenure holders including Indigenous Peoples (i.e. was the legal instrument passed with due process and consultations with such potential rights holders?).
- Summarize the relevant provisions on issues such as the following:
 - The definition of Title to ERs: assess if it is defined (i) as a right that is separated from the land and resources tenure rights, (ii) as a right that is attached to the land and/or resource tenure rights, or (iii) as a right that is specific to the provision of certain ecosystem/environmental services.
 - The alienation of Title to ERs from the tenure rights to the underlying land and resources: assess whether the Title to ERs can be transferred without altering the tenure rights to the land and resources, and what is the legal/administrative process for such transfer (e.g., certification requirements, contractual requirements related to payment for ecosystem services, licenses, concessions).
- Assess if there are any ambiguities, uncertainties, or apparent contradictions in the legal framework that might affect the ER Program (e.g., does the legal instrument cover all of the ER Program Accounting Area/relevant stakeholders). If so, propose a roadmap and a timeline of actions under the ER Program to manage the potential risks due to such ambiguities, uncertainties, or apparent contradictions in terms of the program design and implementation support.
- In the absence of explicit legislative treatment:

- Assess whether any legal instrument (e.g., statutes, regulations, decrees, administrative orders, court decisions) provides sufficient basis for determining the existence, ownership, and transferability of carbon rights (e.g., whether there is a legal basis to conclude that the ownership of carbon is vested in the owners of the land or owners of the resources on land, and that the carbon ownership can be transferred to others who are not land or resource owners).
- Discuss whether the government owns the land and assets needed for carrying out the ER activities, or has a right under a sub-arrangement to occupy the land and/or use the resources on that land for carrying out the ER activities, or can cause the land and resources tenure holders to carry out ER activities through the sub-arrangement, additional agreements or administrative actions.
- Whether the national law (e.g., contract law, property law) will uphold some form of agreement between the Program Entity and the land and resources tenure holders whereby the two agree that the Program Entity will be the only seller of the ERs or that the Program Entity may sell the ERs on behalf of the land and tenure rights holders.

Option 2: Reference to sub-arrangements with potential land and resource tenure rights holders

Guiding Question: Has the Program Entity entered into any sub-arrangements (e.g., contracts, agreements, payment for ecosystem services schemes) that could be the basis for potential land and resource rights holders to claim interests in the Title to ERs?

Guiding Question: Have the potential land and resource tenure rights holders, through the sub-arrangement(s), willingly, expressly, and validly agreed that the Program Entity will be the only seller of the ERs, or that the Program Entity may sell the ERs on their behalf?

- Describe the structure, requirements, enforcement, and duration of the sub-arrangement (i.e. Whether the sub-arrangement is a contract, payment for ecosystem services scheme, or some other agreements? Who are the parties involved, roles and responsibilities, enforceability, etc.).
- Describe the legal basis for the sub-arrangement (i.e., Is the sub-arrangement established under a specific statute of the REDD County, a commercial contract, or some other types of sub-arrangement?)
- Assess whether the sub-arrangement was entered into through a transparent and consultative process (i.e., Were the relevant rights holders properly identified and consulted with prior to entering into such sub-arrangements?).
- Describe how the sub-arrangement affects the ownership and transfer of the Title to ERs.
- If the Title to ERs is attached to the land and resources tenure rights, demonstrate that the land and resource tenure rights holders have willingly, expressly, and validly agreed that the Program Entity will be the only seller of the ERs or that the Program Entity may sell the ERs on behalf of the land and tenure rights holders.

- Discuss whether the government has a right under such sub-arrangement to occupy the land and/or use the resources on that land for carrying out the ER activities, or can cause the land and resources tenure holders to carry out ER activities through the sub-arrangement, additional agreements or administrative actions.
- Discuss how disputes related to the sub-arrangement will be addressed.
- Assess if there are any ambiguities and uncertainties in the sub-arrangement that might affect the ER Program. If so, propose a roadmap and a timeline of actions under the ER Program to manage the potential risks due to such ambiguities and uncertainties in terms of the program design and implementation support.

Option 3: Reference to the Benefit Sharing Plan

Guiding Question: Has the Program Entity prepared a Benefit Sharing Plan in accordance with the Methodological Framework?

Guiding Questions: How has the design of the Benefit Sharing Plan incorporated considerations on land and resource tenure rights (including legal and customary rights of use, access, management, ownership, etc.), and Title to ERs? In particular, have potential land and resource tenure rights holders been included in the list of beneficiaries under the Benefit Sharing Plan? Does the Benefit Sharing Plan require beneficiaries to register with the benefit sharing mechanisms in return for an authorization of the Program Entity to transfer Title to ERs?

- Explain how the benefit sharing arrangement in the Benefit Sharing Plan improves the Program Entity's ability to transfer Title to ERs:
 - Explain if/how far potential land and resource tenure rights holders or owners of Title to ERs have been included in the list of beneficiaries under the Benefit Sharing Plan?
 - If beneficiaries are deemed to have land and resource tenure rights/Title to ERs, how does their participation in the Benefit Sharing Plan help the Program Entity to transfer Title to ERs? Does the Benefit Sharing Plan, for example, require such beneficiaries to register with the benefit sharing mechanism in return for the authorization of the Program Entity to transfer Title to ERs?
 - If beneficiaries are deemed to have potential land and resource tenure rights, but not Title to ERs (e.g. a statute vests Title to ERs to the State regardless of who holds the land and resource tenure rights), describe whether such potential land and resource tenure rights holders are still eligible to receive benefits under the Benefit Sharing Plan.
 - Describe how the benefit sharing arrangement has taken into account the land and resource tenure rights, especially in cases where the Title to ERs derives from land or resource ownership and such ownership may be overlaid with customary use rights.

- Explain how the identification of the eligible categories of beneficiaries under the ER Program and the design of the Benefit Sharing Plan was done in a consultative, transparent, and participatory manner that is appropriate to the country context so that any negative impacts to the underlying land and resources rights of such relevant stakeholders are avoided or minimized.
- If the ownership of ERs is not provided for in the country's legal system or sub-arrangements, explain how the benefit sharing arrangement has provided additional clarity on the Program Entity's ability to transfer Title to ERs under the ER Program.
- Explain if the relevant feedback and grievance redress mechanism for the ER Program is available to address grievances and disputes related to the benefit sharing arrangement.

Document history

Version	Date	Notes
Version 1	January 2018	Initial version published by the FMT.