LEGAL ANALYSIS
FOR A PROPOSED LAKE COUNTY CONSERVATION DISTRICT CONSERVATION FOREST

Prepared for Lake County Conservation District

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I. INTRODUCTION

The Lake County Conservation District (LCCD) is proposing the establishment of a Conservation Forest The model includes the following key points:

- An approximately sixty thousand (60,000) acre forest, within the LCCD boundaries, to be established on the Flathead National Forest.
- The Conservation Forest to be managed in trust for the LCCD by the Montana Department of Natural Resources and Conservation (DNRC).
- All lands included in the Conservation Forest continue to be owned by the United States Government. The people of the United States continue to have the right to all lawful uses of these forest lands.
- The Conservation Forest to revert to United States management one hundred (100) years after Congress approves establishment of the Conservation Forest.
- All net revenues from proactively managing the Conservation Forest will initially be invested in conservation work on federal lands, State of Montana lands, Tribal lands and private lands that are in the Swan Valley and within the boundaries of the LCCD. Revenues may be invested in lands out side of the Swan Valley, but within the boundaries of the LCCD on any lands regardless of ownership, when money is available."
- DNRC will manage the Conservation Forest pursuant to Montana's laws, rules and regulations.

The LCCD commissioned a study entitled "Estimate of Revenues and Cost for a Proposed LCCD Conservation Forest 7/29/15." The study's objective was to evaluate whether the proposed Conservation Forest could be an economically viable proposition. The study concluded the proposed Conservation Forest could be economically viable. The study did not investigate the legal or political feasibility of the proposal.

Notwithstanding any political barriers, LCCD has requested a legal analysis to determine if there are any legal barriers to the implementation of the proposed Conservation Forest. If barriers are identified, can they be addressed to allow for the establishment of the Conservation Forest? First, the analysis reviews the historic working relationship between Montana conservation districts and the federal government. Then specifically, the legal analysis addresses the National Forest Management Act, the Tribal Forest Protection Act, the Multiple-Use Sustained-Yield Act, the Equal Access to Justice Act, the Montana Enabling Act, and the Montana Conservation District Law to identify any legal barriers.

The underlying assumption of this legal analysis is that the implementation of the LCCD Conservation Forest requires consideration of the impacts on the environment before the transfer of management of the Conservation Forest from the United States Department of Agriculture and/or before a timber harvest is undertaken. Compliance with the requirements of either the National Environmental Policy Act (NEPA), 42 USC § 4321 *et seq.*, or the Montana Environmental Protection Act (MEPA), Mont. Code Ann. § 76-15-101, *et seq.,* is not considered a legal barrier to the establishment of the Conservation Forest. Under either act there is an assessment of the proposed action to determine the environmental and related social and economic effects. While NEPA applies to lands receiving federal funding or under federal influence, exemptions to NEPA can be created through legislation requiring an impact analysis similar to NEPA.

II. CONSERVATION AND THE WORKING RELATIONSHIP BETWEEN THE UNITED STATES AND CONSERVATION DISTRICTS

The concept of the Conservation Forest embraces the historical tie between the United States and conservation districts.

The establishment of the conservation districts can be traced to a 1937 letter from the President of the United States to the Governor of Montana. The Conservation Forest concept grows out of the government-to-government relationship and the development of water and soil conservation in this nation.

It is difficult to precisely define the beginning of conservation of the water and soil resources in the United States. It is generally agreed that the first national conservation movement in the United States generally began around 1890 and ran through 1920. Prior to 1890, the abundant supplies of timber held a relatively low value encouraging liberal use of the resource. There was little economic incentive to preserve basic productive capacity when it conflicted with exploitation for immediate profit, and even less incentive to invest in the future of the resource. Also, technical knowledge on resource conservation was often lacking. Limited transportation means and abundant forests gave foot travelers the perception the forest resource was limitless. Land was cleared, farmed, and abandoned, often within a generation.

For most of the nineteenth century, the early United States' public land was readily available for private transfer. The disposition era of public lands was a headlong, often heedless, process. Disposition was accompanied by fraud, speculation and waste – waste in terms of lives and money spent attempting to develop land with limited capacity for successful farming or other commercial use. Early American public land policy may be defended as a necessary part of building a new nation on a previously undeveloped continent, but it was nevertheless marked by lavish, if not wasteful, use of the land and water resources.

The waste of natural resources was a major concern and a catalyst for the conservation movement. The conservation movement sought to instill ideas based on concerns for future generations instead

of wholly for the present, on stewardship instead of exploitation, and on some sort of higher duty instead of profit.

By 1933 the Great Depression had grasped the heartland of America. The United States was in an economic crisis. A number of programs for drastic economic and social change were advanced. These proposals included a major public works program of soil conservation on private land as a means of employing men to protect and improve the land. On April 27, 1935, President Roosevelt signed the Soil Conservation Act of 1935. Unanimously passed by Congress, the Soil Conservation Act established the Soil Erosion Service (later renamed the Soil Conservation Service, and now known as the Natural Resources Conservation Service), which provides soil conservation programs under the Department of Agriculture. This congressional action established soil conservation as an accepted national program – conservation of land for its own value, not merely as a means of employing idle workers. Further, it established soil conservation as a distinct program in the Department of Agriculture. Under the program, farmers voluntarily approach the Natural Resources Conservation Service for technical assistance in planning soil management programs.

Massive dust storms from 1933 through 1936 shocked the nation. As part of the development of the New Deal legislation concerning soil conservation, it was believed local organization was necessary to achieve soil conservation. The Secretary of Agriculture's Committee on Soil Conservation recommended that all erosion control work on private lands would be undertaken by the Soil Conservation Service only through state legislated local soil conservation districts. Consequently, a model state law for the establishment of soil conservation districts was developed for state consideration.

In 1937, President Roosevelt sent a letter to the governor of each state suggesting that local districts be established under state law

for conservation of soil and water resources. Although all of the states, plus Puerto Rico and the Virgin Islands, have adopted local conservation district laws, Montana was one of the first states to respond to President Roosevelt's invitation. In 1937, Montana enacted a law creating soil conservation districts. During the next legislative session, in 1939, Montana repealed this newly enacted legislation in favor of more comprehensive legislation, enacting "The State Soil Conservation District Law." The 1939 law re-created state districts to engage in soil resource conservation, and prevent and control soil erosion through programs and regulations. It further gave the districts the power to enforce its programs and regulations.

Many of today's soil conservation programs and institutions are a legacy of the 1930's. However, since the 1930's, soil conservation programs have evolved to encompass many goals beyond maintaining soil productivity and supporting farm income. These goals include flood control, water quality improvement, cropland recovery, and general environmental protection.

Montana's 1937 legislation created a state soil conservation committee with the power to take over, and to administer, any soil conservation, erosion-control, or erosion prevention project located within the conservation district boundaries undertaken by the United States or the state.

In the subsequent, expanded, 1939 law, the legislature made a very specific and comprehensive legislative policy declaration:

> It is hereby declared to be the policy of the legislature to provide for the conservation of the soil and soil resources of this State, and for the control and prevention of soil erosion, and thereby to preserve natural resources, control floods, prevent impairment of dams and reservoirs, preserve wildlife, protect the tax base, protect public lands, and protect and promote the health,

> safety, and general welfare of the people of this State.

This declaration remains a part of the law today.

As enacted in 1939, the Montana Conservation District laws established a state agency, the soil conservation committee, to service the needs of the local soil conservation districts. The committee was composed of seven members. In addition, the law invited a person appointed by the Secretary of Agriculture of the United States as a non-voting member. A basic duty of the soil conservation committee was to secure the cooperation and assistance of the United States and the Montana state agencies. The state soil conservation committee remained in existence until the reorganization of Montana state government in the early 1970s. The committee was eliminated and its functions transferred to the newly created Montana Department of Natural Resources and Conservation. The Department of Natural Resources and Conservation continues to carry out the functions originally assigned to the soil conservation committee.

The keystone of the 1939 law was to allow for the creation of soil conservation districts. Soil conservation districts were created as local government entities, as requested by President Roosevelt and modeled by the Secretary of Agriculture's Committee on Soil Conservation. The conservation district law, among other powers, allowed conservation districts to take over and administer any soil-conservation, erosion-control, or erosion-prevention project located within the district previously undertaken by a federal or state agency. Although the original powers of the soil conservation districts remain intact today, the districts have been given broader authority in working with landowners, other conservation districts, state agencies, and the United States.

The working relationship between the United States and local conservation districts, specifically as it relates to undertaking federal conservation related projects located within the conservation district

boundaries, is not a unique or novel concept. The management of the Conservation Forest on the Flathead National Forest creates a new opportunity in the continuing development of an existing relationship. However, in reviewing this new opportunity it is necessary to analyze existing federal and state law to identify legal barriers to the implementation of the Conservation Forest by a local government entity, i.e., a conservation district.

III. FEDERAL LAW

National Forest Management Act

The National Forest Management Act of 1976 (NFMA) was enacted to address damage to natural ecosystems on public lands. It is a forest management act arising specifically from debates over the clear-cutting of forests. The NFMA creates a system for forest management. Administered by the Secretary of Agriculture, Congress instructed the United States Forest Service to develop regulations addressing the harvest of timber on national forest lands and to ensure prompt reforestation.

The Secretary of Agriculture is required by the NFMA to evaluate forest lands, develop a management program based on multiple-use sustained-yield principles, and implement a resource management plan for each unit of the National Forest System, such as the Flathead National Forest. The act is the primary regulation governing the administration of national forests.

The NFMA provides the procedural and substantive requirements for national forest management. These requirements are codified in the Forest Service's 2012 Planning Rule. The 2012 Planning Rule established localized Land and Resource Management Plans (LRMP) and Land Management Plans (LMP), also known as Forest Plans. Forest Plans must be amended as necessary, or no later than every 15 years. Here, Congress has not deferred to the agency (Department of Agriculture/Forest Service) to make forest

management guidelines and decisions. Instead, enacting the NFMA, Congress provided specific national guidelines in a comprehensive statute. Forest Plans comply with the NFMA's logging and timber sale limitations as well as restrictions on wildlife viability and acceptable levels of habitat disturbance. The NFMA develops plans that "promote the ecological integrity of national forests." In addition, all Forest Plans must be consistent with the Multiple-Use Sustained-Yield Act (MUSYA) and the National Environmental Policy Act (NEPA), the Clean Air Act (CAA), the Clean Water Act (CWA), the Wilderness Act, and the Endangered Species Act (ESA). More specifically under MUSYA the Forest Service must assure the forest plan includes consideration of "outdoor recreation, timber, watershed, wildlife and fish, and wilderness."

Initially, the NFMA requires uniform management. Congressional intent shows that once land is included in the National Forest System, all such areas should be managed in "one integral system." Additionally, once designated into the National Forest System, the NFMA stipulates it will remain in the public domain, notwithstanding an "act of Congress." While the LCCD is not proposing to remove the Conservation Forest from the National Forest System, separate management might defeat the goal of uniform management of National Forests to "serve the national interest."

Congress has given the Department of Agriculture exclusive management of National Forests under the NFMA. The NFMA requires the Secretary of Agriculture to provide an annual report to Congress on the National Forests "includ[ing], but not be limited to, a description of the status, accomplishments, needs, and work backlogs for the programs." These requirements are an attempt to allow the Department to pinpoint areas that are not meeting the NFMA standards or require more attention. The LCCD does not fit within the authority of the Department of Agriculture, and therefore could not be delegated management duties under the NFMA.

Forest Plans must be revised at least every fifteen years under the NFMA. This requirement might be an issue for delegating long-term management to the LCCD for the Conservation Forest. Public participation is considered an essential part of National Forest management. New and revised plans must be made reasonably available to the public at least three months before a Forest Plan is adopted. This comment period allows for outside interest groups to express their opinions on national forests. It allows the Forest Service to balance and hear different interests of potential user groups.

The NFMA requires National Forests to be uniformly managed by the Department of Agriculture. The NFMA also affords interest groups opportunities to provide input on National Forest management as well as consideration and utilization of the data provided by such entities. Congress manages the National Forests through the NFMA in a great detail. The NFMA does not allow for non-federal management of a national forest. To establish the LCCD Conservation Forest, the LCCD will need to have Congress consent explicitly for management outside of the Department of Agriculture.

Tribal Forest Protection Act

The Tribal Forest Protection Act of 2004 (TFPA) was enacted consistent with the National Indian Forest Resource Management Act. The National Indian Forest Resource Management Act purpose was to increase tribal influence in the management of their lands, while still maintaining the federal trust relationship between the government and tribes.

Under the TFPA, tribes have the general authority to protect tribal forest land including the ability to propose projects to restore federal land adjacent to tribal forests. The Secretary of Agriculture and the Secretary of the Interior may enter into agreements or contracts with tribes to carry out management of federal lands "bordering or adjacent to the Indian forest land or rangeland under the jurisdiction of the Indian tribe." Tribes can submit requests to the

appropriate managing secretary, and the secretary then needs to respond within 120 days. “Indian forest land” is defined as land either held in trust for a tribe or member, or is Indian forest land under the National Indian Forest Resources Management Act. For the land to meet the management criteria, it must meet four elements:

> (1) the Indian forest land or rangeland under the jurisdiction of the Indian tribe borders on or is adjacent to land under the jurisdiction of the Forest Service or the Bureau of Land Management;
> (2) Forest Service or Bureau of Land Management land bordering on or adjacent to the Indian forest land or rangeland under the jurisdiction of the Indian tribe--
>
> (A) poses a fire, disease, or other threat to--
>
> (i) the Indian forest land or rangeland under the jurisdiction of the Indian tribe; or
>
> (ii) a tribal community; or
>
> (B) is in need of land restoration activities;
>
> (3) the agreement or contracting activities applied for by the Indian tribe are not already covered by a stewardship contract or other instrument that would present a conflict on the subject land; and
> (4) the Forest Service or Bureau of Land Management land described in the application of the Indian tribe presents or involves a feature or circumstance unique to that Indian tribe (including treaty rights or biological, archaeological, historical, or cultural circumstances).

The TFPA recognizes greater landscape management for tribes if they have a significant interest in the management of the federal land outside of their tribal boundaries. Since the proposed Conservation Forest is adjacent to the Confederated Salish Kootenai Tribes (CSKT) land, this statute could be invoked.

For the LCCD, this means the Conservation Forest proposal must take into account the potential ability of the CSKT's Tribal government to enter into a contract to manage the surrounding federal lands. Such a contract would have to be approved by the Secretary of Agriculture. The management criteria, and other qualifying factors, could potentially be met by the CSKT. CSKT's management might be in conflict with the LCCD's land management goals.

Research did not establish if the federal trust relationship recognized by the National Indian Forest Resource Management Act would extend to adjacent lands. Also worth noting is that in general tribal land management is rarely subjected to state laws. With the TFPA's protection of tribal resources on adjacent federal lands, the CSKT has influence over the proposed Conservation Forest. The CSKT have historical ties to the land, which would support a strong claim for a tribal management contract.

Multiple Use Sustained Yield Act

The Multiple Use Sustained Yield Act (MUSYA) is a supplemental statue which expands upon the management of resources within national forests. The MUSYA comprehends a utilitarian view of forest resources considering different uses such as, "outdoor recreation, range, timber, watershed, and wildlife and fish purposes," and taking them into account in forest management decisions. Administered by the Secretary of Agriculture, the MUSYA affords the Forest Service's management decisions "wide discretion."

The MUSYA defines "multiple use" as

> [t]he management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all

> of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

The MUSYA defines "sustained yield of the several products and services" as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land." The MUSYA does not reserve any additional water resources in national forests, or affect the States "jurisdiction or responsibilities . . . with respect to wildlife and fish on the national forests." Upon the MUSYA's approval, the Secretary of Agriculture supported the statute as a measure to prevent a single forest use, and promote "efficient, effective forest management." The MUSYA allows the forest service to consider both resource and environmental values.

As the MUSYA is supplemental to other procedural forest regulations, such as NFMA, it will merely have to be taken into consideration when decisions are made as pertaining to the management of the proposed Conservation Forest. The proposed Conservation Forest would have to comply with the Multiple Use-Sustained Yield requirements just as the Secretary of Agriculture must take into account a variety of forest uses. It appears there is no part of the MUSYA which would impact the Conservation Forest proposal in such a way to prevent compliance.

Equal Access to Justice Act

The EAJA allows for attorney fees to be collected from litigation actions against the government when the opposing party makes a successful claim. A party prevails under the EAJA when they are successful on any issue in the litigation or achieve the desired outcome of the case. The party not only has to prevail in a lawsuit against the government, but then needs to prove it was "substantially justified or that special circumstances make an award unjust." "Substantial justification" in this context has been interpreted to shift the burden of proof to the government, to further justify their actions after losing the lawsuit. The ability to prove substantial justification overrules the issue of time limits barring appeals for fees. The EAJA places limits on the net worth of the individuals claiming fees and on the amount of the fees which can be recovered.

The EAJA may be invoked if a lawsuit is filed, litigated, and successful against the government. This type of lawsuit might stem from the approval of the transfer of management of the federal forest lands from the USDA It may be easier to prevail on a "significant issue" if challenges brought against certain management decisions made by the new managing entity. Limitations would be placed on any action for fees against the government. At this time, there is not enough information to make any determinations about the applicability of the EAJA, except to be mindful it is an aspect of potential government challenges.

IV. STATE LAW

Enabling Act

Montana was admitted to the Union as a state under the Omnibus Enabling Act of 1889 (Enabling Act), along with North Dakota, South Dakota, and Washington. The Enabling Act provided the mechanism by which the Montana Territory was admitted as states

following ratification of state constitutions and the election of state officers.

Montana's admission to the union contains a condition in the disclaimer clause of the Enabling Act. It provides,

> [T]hat the people inhabiting the proposed States … agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, … and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States .. .

Having the same weight as a constitutional amendment, the adoption of Ordinance No. 1 of the Enabling Act, specifically the disclaimer clause, became the fundamental law of Montana. Montana's disclaimer is almost identical to those in the constitutions and enabling acts under which Congress admitted most western states into the Union. The disclaimer provision was a requirement for various state constitutions with the intent to ensure supremacy of federal policy and federal law on the unappropriated public lands within the boundaries of the respective states.

The LCCD proposal for a Conservation Forest must be analyzed recognizing the supremacy of federal policy and federal law as applied to the Department of Agriculture's management of the Flathead National Forest. The proposal itself does not transfer any right or title of the unappropriated public lands to the conservation district or to the Montana. The proposal seeks authorization to manage the Conservation Forest on the national forest; it does not seek an ownership interest in the public lands. Consequently, the Enabling Act does not bar the development of the LCCD Conservation Forest.

In any event, the Enabling Act provides that, with respect to the transfer of any right or title in the public land, “the same shall be and remain subject to the disposition of the United States.” In plain language, Congress can act to effect the transfer of any right or title from the public land.

The preparation of the legal analysis concludes that the NFMA requires National Forests to be uniformly managed by the Department of Agriculture. To establish the LCCD Conservation Forest, the LCCD will need Congress’s explicit consent to management outside of the Department of Agriculture. Since congressional action is necessary for the proposal to go forward, the disposition of any right in the public land will occur as a direct result of the congressional action. The existence of any bar arising from the Enabling Act will be overcome with explicit congressional consent to the establishment of a Conservation Forest on the Flathead National Forest.

Conservation District Law

Current Conservation District Law (CD Law) traces back to the creation of soil conservation districts in 1937. While CD Law was originally a response to the dust storms of 1933 through 1936 and the need for soil erosion programs, it presently encompasses many goals beyond the maintenance of soil productivity. The CD Law provides the substantive and procedural requirement for the operation of Montana conservation districts. It is the CD Law that opens the door for conservation districts to work with each other, as separate political subdivisions of the state, other local, and state and federal government agencies.

Conservation districts have authority under the state conservation district law to manage projects on federal lands. Conservation districts have the power to acquire property by various means, to manage the property, and receive income from the property. LCCD’s proposed Conservation Forest does not contemplate

changing ownership of the federal lands in question; the objective is to transfer management responsibilities on those federal lands. There is no specific state statute dealing with publicly owned federal lands similar to Mont. Code Ann. § 76-15-317, a statute dealing with publicly owned state lands. Consequently, it is necessary to review the CD Law to see where the legislature has included interaction between the United States and conservation districts.

Initially, it should be recognized that Montana's legislature has resolved it is state policy:

> It is hereby declared to be the policy of the legislature to provide for the conservation of soil and soil resources of this state, for the control and prevention of soil erosion, for the prevention of floodwater and sediment damages, and for furthering the conservation, development, utilization, and disposal of water and thereby to preserve natural resources, control floods, prevent impairment of dams and reservoirs, preserve wildlife, protect the tax base, protect public lands, and protect and promote the health, safety, and general welfare of the people of this state.

Additionally, the legislature has determined:

> that to conserve soil resources and control and prevent soil erosion and prevent floodwater and sediment damages and further the conservation, development, utilization, and disposal of water, it is necessary that land use practices contributing to soil wastage and soil erosion be discouraged and discontinued and appropriate soil-conserving land use practices and works of improvement for flood prevention and the conservation, development, utilization, and disposal of water be adopted and carried out; … .

The legislative policy and legislative determination apply equally to all lands possibly susceptible to soil erosion, soil blowing,

soil washing, and siltation of waterways. Covering valuable watershed areas, federal grazing lands and forest lands falls within the conservation, prevention, preservation, and protection mandates delegated to conservation districts under state law.

Accepting that federal forest lands may be subject to the jurisdiction of conservation districts by enactment of federal law, it is necessary to determine whether statutory authority allows for conservation districts to be involved in the management of federally owned forest lands under existing state law. A facial reading of the operative statute reveals that conservation districts may become involved in various "projects," "programs," "operations," "measures," and "works." Since none of these terms are defined in the statute, the law accords them their ordinary meanings, which taken individually or in combination, embrace the concept of management of natural resources, including lands. In pertinent parts, the statute provides:

> A conservation district and the supervisors of the conservation district may:
>
> (1) conduct soil, vegetation, and water resources conservation projects on lands within the districts upon obtaining the consent of the owner of the lands or the necessary rights or interest in the lands;
>
> (2) carry out preventive and control measures and works of improvement for flood prevention and the conservation, development, utilization, and disposal of water, including but not limited to engineering operations, range management, methods of cultivation, growing vegetation, changes in use of land, and the measures listed in 76-15-101(3) on:
>
> ***
>
> (b) any other lands within the district upon obtaining the consent of the occupier of the lands or the necessary rights or interests in the lands;
>
> (3) cooperate or enter into agreements with and, within the limits of appropriations duly made

available to it by law, furnish financial or other aid to any governmental or other agency or any occupier of lands within the district, subject to any conditions that the supervisors consider necessary to advance the purposes of this chapter, to conduct or complete:

(a) erosion control and prevention operations; and

(b) works of improvement for flood prevention and the conservation, development, utilization, and disposal of water within the district;

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(5) purchase, lease, or otherwise take over and administer projects undertaken by the United States or the state within the district boundaries for:

(a) soil conservation;
(b) flood prevention;
(c) drainage;
(d) irrigation;
(e) water management;
(f) erosion control; or
(g) erosion prevention;

(6) manage, as agent of the United States or of the state any of the types of projects identified in subsection (5) within its boundaries;

(7) act as agent for the United States or for the state in connection with the acquisition, construction, operation, or administration of any of the types of projects identified in subsection (5) within its boundaries;

*** .

In subsections (5), (6), and (7) of Mont. Code Ann. § 76-15-403 above, Montana has explicitly addressed the authority of a conservation district to undertake and manage federal projects. Arguably, Mont. Code Ann. § 76-15-403, dealing with the operation of conservation districts, provides sufficient authority to conservation

districts to manage a federal forest. Nevertheless, given that the Conservation Forest proposal cannot move forward without congressional consent, serious consideration must be given to drafting explicit language into the CD Law to address the authority of a conservation district to enter into agreements with the United States to establish a Conservation Forest.

Assuming Congress consents to the establishment of a Conservation Forest on a National Forest, a potential issue arises whether state law management can supersede federal law as to how to manage national forest land. As stated in the discussion above, a conservation district is authorized to "manage, as agent of the United States … any of the types of projects identified in subsection (5) within its boundaries," and to "act as agent for the United States … in connection with the … operation, or administration of any of the types of projects identified in subsection (5) within its boundaries." Under Montana agency law, an agent may be authorized to do any acts that the principle may do. The United States entities (the principles) are authorized to manage federal lands under federal law. Consequently, a conservation district that acts as the agent of the principle can only act pursuant to the authority under which the principle performs, i.e. federal law.

The State law, which authorizes conservation districts to manage or act as an agent for the United States, simply recognizes the Supremacy Clause of the United States Constitution. The Supremacy Clause establishes that the United States Constitution, pursuant to federal laws and treaties made under its authority, constitute the supreme law of the land. The clause provides that the federal law binds state courts; in case of conflict between federal and state law, the federal law must be applied. Even state constitutions are subordinate to federal law. The federal government possesses the supreme authority accorded it by the United States Constitution.

The Supremacy Clause effectively allows federal law to preempt state law. While it is often a question of congressional intent, the United States Supreme Court has articulated three instances in which state law is preempted: (1) when a federal statute states it explicitly; (2) when state law regulates conduct in a field that Congress intended the federal government to occupy exclusively; and (3) to the extent state law conflicts with federal law.

Under the United States Constitution, the federal government's authority is limited to the exercise of powers expressly delegated, and powers necessary and proper in carrying out those enumerated powers. Congress is granted the power to control the use of federal public lands. The Property Clause grants Congress the constitutional authority for the management and control of all United States property. National Forests are lands the federal government owns and controls. Consequently, to the extent state law would not be consistent with the management of federal lands under federal law, any agent of the federal government would be required to implement federal law.

If congressional consent is given, as it must be, for implementation of the LCCD Conservation Forest, it must be done expressly, i.e., enacting a law authorizing the Secretary of Agriculture to enter into an agreement with a conservation district to act as the agent of the United States in the management of the Conservation Forest on a National Forest. State legislation cannot ignore federal law and policy. Therefore, a conservation district cannot take over management of the Conservation Forest, albeit through management agreements with Montana DNRC, on a National Forest solely because state law grants a conservation district the authority to do so. Whether CD Law presently allows, or additional CD Law is enacted to further strengthen the law, it is necessary for express congressional consent for the LCCD's Conservation Forest proposal on the Flathead National Forest to be viable. It is not viable if only allowed by state law.

V. Study Summary

The legal analysis was conducted to determine whether there are legal obstacles arising under specific federal and state laws to prevent the implementation of the proposed LCCD Conservation Forest on the Flathead National Forest under an agreement with the United States Forest Service.

Federal Law

A review of NFMA reveals that congressional authorization explicitly allowing the United States Forest Service to enter into a forest management agreement or lease is required for the LCCD Conservation Forrest Proposal to be implemented.

Although not a statutory bar to the implementation of the Conservation Forest, the proposal must take into account the potential ability of the CSKT's Tribal government to enter into a contract to manage the surrounding federal lands, which include the Flathead Nation Forest. It is imperative that LCCD keep the CSKT tribal government informed of LCCD's proposal as it moves forward to ensure success of the proposal.

The management of the Conservation Forest may provide the opportunity for an aggrieved person or party to initiate litigation relative to a specific management action under the EAJA, absent contrary federal legislation authorizing the proposal.

The MUYSA was enacted by Congress to stem the mostly exclusive development of the national forests by logging and water reclamation projects. The law officially mandated the management of national forests to "best meet the needs of the American people." Pursuant to the MUYSA, national forests should be used for a balanced combination of "outdoor recreation, range, timber, watershed, and wildlife and fish purposes." The Act itself does not preclude the implementation of the proposed LCCD Conservation Forest. Nevertheless, unless federal legislation gives explicit

congressional consent to implement the Conservation Forest addressing how the MUYSA balance is to be achieved, the Secretary of Agriculture will need to consider the MUYSA in approving a lease or management agreement for the establishment of the LCCD Conservation Forest.

State Law

The Conservation Forest proposal itself does not call for the transfer of any right or title of the unappropriated public lands to the conservation district. As such, the state-enabling act is not a bar to the proposal. Because federal legislation must be enacted for the Conservation Forest to be feasible, such legislation would explicitly be in accord with Montana's enabling act.

State CD Law liberally construed allows a conservation district to enter into agreements with the United States Department of Agriculture and to act as an agent for the United States on natural resource projects. Because of the unprecedented nature of the Conservation Forest proposal, clarification of the CD Law specifically authorizing implementation of a Conservation Forest is recommended.

VI. Conclusion

The Conservation Forest proposal is not feasible under existing federal law, specifically NFMA. It is clear that federal legislation explicitly consenting to the establishment of a Conservation Forest in a national forest is necessary. The express language of legislation seeking congressional consent or clarifying state law is beyond the scope of this report. However, federal legislation consenting to the establishment of a Conservation Forest should be drafted to address how, or the extent to which, the other federal laws are to be implemented in granting congressional consent for the implementation of a Conservation Forest. Consideration should be given to placing an exemption in legislation providing that the impact analysis be pursuant to MEPA as a functional equivalent to NEPA. Similarly, the federal enabling legislation should address the key provision in the proposal to manage the LCCD Conservation Forest pursuant to Montana's laws, rules and regulations.

It is recommended that the state CD Law be amended to include a specific reference to the authority of a conservation district to enter into the necessary leases or agreements with the United States to implement a Conservation Forest.