



Forest Service Payments to Counties— Title I of the Federal Forests County Revenue, Schools, and Jobs Act of 2012: Issues for Congress

Ross W. Gorte

Specialist in Natural Resources Policy

Kristina Alexander

Legislative Attorney

M. Lynne Corn

Specialist in Natural Resources Policy

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Summary

Since 1908, the Forest Service (USFS) in the Department of Agriculture has paid 25% of its receipts to the states for use on roads and schools in the counties where the national forests are located. The Bureau of Land Management (BLM) in the Department of the Interior has paid 50% of its receipts to the Oregon counties where the revested (returned to federal ownership) Oregon and California Railroad (O&C) grant lands are located. Payments under these programs dropped substantially in the 1990s, largely because of declining timber sales. In the Secure Rural Schools and Community Self-Determination Act of 2000 (P.L. 106-393; SRS), Congress created an optional alternative payment system for these lands, but the law expired at the end of FY2011.

The 112th Congress has considered options for addressing the lower payments from federal lands due to lower timber sales. One bill, H.R. 4019 (Title I, the County, Schools, and Revenue Trust for Federal Forest Land), would establish a new payment program; the House Committee on Natural Resources has ordered the bill reported. The bill would establish the trust with receipts from certain projects, and give the USFS the “fiduciary responsibility” to undertake projects to achieve annual revenue requirements in counties that do not opt out of the trust program. The bill would direct the USFS to calculate the revenue requirements and, to implement trust projects, establish procedures for public involvement, environmental reporting, and judicial review. The bill also would direct the allocation and use of the trust payments, and provide appropriations for the payments until trust projects generated receipts for the trust payments.

H.R. 4019 raises several issues for Congress. One is that, although the trust program has been described as a replacement for the SRS, the payments would apparently be in addition to the USFS 25% and O&C 50% payments that had been replaced by the SRS. Also, the fiduciary responsibility for trust payments makes the counties the primary beneficiary of federal land management and could restrict the ability of individuals to challenge decisions that they feel could degrade the federal lands and resources. The annual revenue requirement—60% of average 1980-1999 gross receipts—raises several questions: what would be included in “gross receipts”; what receipts could be deposited in the trust (e.g., whether deposits to other accounts could instead be deposited in the trust); how much additional revenue would be needed; and where those revenues could come from (e.g., how much additional timber might need to be cut, how many jobs might be created, where the timber could be cut, and what other options might be feasible, such as permits for currently free uses). Public involvement would be limited to written comments and objections to proposed and final trust decisions, filed before the required environmental report is prepared. The environmental report would not need to be made available, and could not be challenged in court or administratively. Trust project decisions would be presumed to be in accordance with several laws, such as the National Environmental Policy Act, the Endangered Species Act, and the National Forest Management Act. The 65% of trust project receipts that would be paid to the states would be a significant increase over the 25% USFS payments and the 50% O&C payments. The bill is unclear on the allocation among states; it could be based on historic receipts or on SRS payments, with substantially different results. There could also be numerous implementation issues, such as treatment of state education funding, inclusion of the O&C lands, forests with some counties opting out of the trust payments, existing federal timber sale requirements, the possible need for implementing regulations, and possible additional staffing and funding requirements.

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Since 1908, the Forest Service (USFS) in the U.S. Department of Agriculture has paid 25% of its gross receipts from timber sales and most other revenue-generating activities to the states for use on roads and schools in the counties where the national forests are located. This was intended to compensate localities for the tax-exempt status of federal lands.¹ Similarly, since 1937, the Bureau of Land Management (BLM) in the U.S. Department of the Interior has paid 50% of its gross receipts to the counties containing the “O&C lands” (described below). Payments have declined substantially in many areas due to falling USFS and BLM timber sales. Congress has enacted temporary programs to sustain the payments at higher levels; the most recent such program, the Secure Rural Schools and Community Self-Determination Act of 2000 (SRS), expired following payments made for FY2011. Because of continuing concerns about substantial declines in USFS and BLM timber sales and payments for county roads and schools, Congress is considering related legislation. Title I of H.R. 4019, the Federal Forests County Revenue, Schools, and Jobs Act of 2012, addresses federal land management to provide timber jobs and revenues for county roads and schools.² The House Committee on Natural Resources ordered the bill reported on February 16, 2012.

Background

Federal Timber Harvests

The USFS has been selling timber for more than a century. The President was authorized to proclaim national forests (originally called forest reserves) in 1891.³ Congressional concerns over proclamations by President Grover Cleveland led to provisions in the Sundry Civil Expenses Appropriations Act for FY1898 limiting the forest reservations to specific purposes, including “to furnish a continuous supply of timber for the use and necessities of citizens,” and authorizing the sale of “dead, matured, or large growth of trees.”⁴ The first timber sale was in 1899 to the Homestake Mining Company in South Dakota.

USFS timber sales grew slowly in the subsequent decades. Then, in the 1950s, USFS sales expanded rapidly, fueled by demand from the post-World War II economic expansion and by the decline in timber supply from private forests. (See **Figure 1.**) Except for the 1980 and 1982 recessions, the high USFS timber sale level was sustained through the 1980s. The decline in USFS sales began in 1990 with litigation to protect the northern spotted owl in western Washington, western Oregon, and northwestern California. Though commonly believed to be a result of listing the northern spotted owl as threatened under the Endangered Species Act (ESA),⁵

¹ See CRS Report R42439, *Compensating State and Local Governments for the Tax-Exempt Status of Federal Lands: What Is Fair and Consistent?*, by Ross W. Gorte and M. Lynne Corn.

² Titles II and III address different issues, and are not covered in this report. Title II amends the Payments in Lieu of Taxes (PILT) Program (16 U.S.C. §§ 6901-6907; for information on the PILT Program, see CRS Report RL31392, *PILT (Payments in Lieu of Taxes): Somewhat Simplified*, by M. Lynne Corn). Title III addresses the USFS Recreation Residence Program that authorized permits and fees for private cabins on national forest lands; for more information, see the USFS website at <http://www.fs.fed.us/specialuses/special-recreation-residence.shtml> or contact Carol Hardy Vincent, CRS Specialist in Natural Resources Policy, 7-7266 or chvincent@crs.loc.gov.

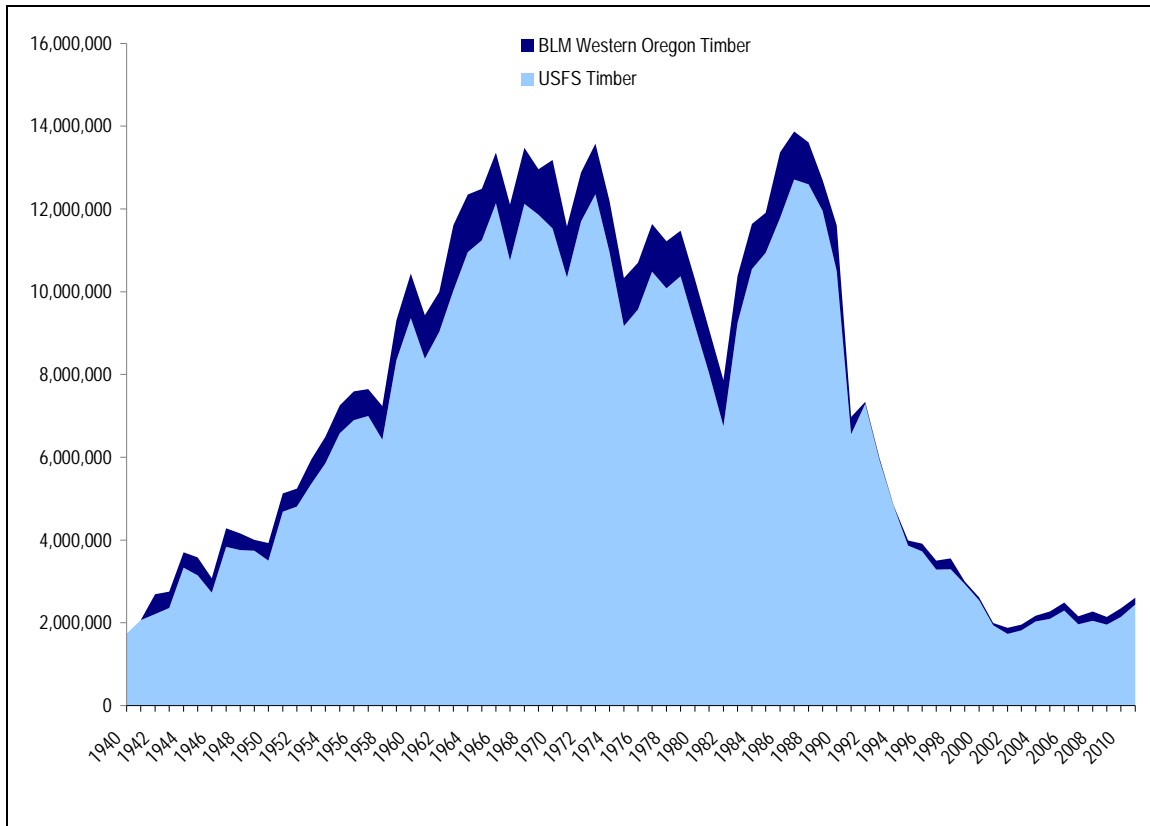
³ Act of March 3, 1891 (ch. 561, 26 Stat. 1103), Section 24 (16 U.S.C. § 471, repealed in 1976).

⁴ Act of June 4, 1897 (ch. 2; 30 Stat. 11), 7th and 9th unnumbered paragraphs under “Surveying the Public Lands” (16 U.S.C. §§ 475-476, the 9th paragraph was repealed in 1976). Commonly referred to as the USFS Organic Act.

⁵ Act of December 28, 1973 (P.L. 93-205; 16 U.S.C. §§ 1531-1540). The northern spotted owl was listed as threatened throughout its habitat on July 23, 1990.

the original litigation was primarily under a provision of the regulations to implement the National Forest Management Act of 1976 (NFMA)⁶ that required management for viable populations of native species.⁷ However, USFS timber sales declined in nearly all regions in the early 1990s, indicating more widespread problems than just northern spotted owls. USFS timber sales have continued at relatively modest levels for the past two decades, owing to continued concerns about the environmental effects of timber sales and relatively weak wood products demand in the United States and globally.

Figure I. Federal Timber Sales
(in thousand board feet)



Source: USFS: Doug Crandall, Director, Legislative Affairs, USFS. BLM: Amy Krause, Legislative Specialist, BLM.

Notes: USFS timber is harvest level rather than sale level, to avoid the spikes in sales from four very large, long-term (50-year) timber sales issued over the 70-year period. BLM timber is sale level from the O&C lands.

The Bureau of Land Management (BLM) in the U.S. Department of the Interior (DOI) also sells timber. The vast majority (about 95%) of BLM timber sales are from the Oregon and California (O&C) grant lands in western Oregon. These lands were granted to the Oregon and California Railroad Company in 1869 for building a railroad north from the Oregon-California border, and the lands were to be sold to settlers. The 2.5 million acres of timberland in western Oregon were

⁶ Act of October 22, 1976 (P.L. 94-588; 16 U.S.C. §§ 1600-1614). The viable population requirement, derived from 16 U.S.C. § 1604(g)(3)(B), was at 36 C.F.R. § 219.19.

⁷ S. L. Yaffee, *The Wisdom of the Spotted Owl: Policy Lessons for a New Century* (Washington: Island Press, 1994).

returned to (“revested in”) federal ownership under a U.S. Supreme Court decision in 1915 for violations of the terms of the grant.⁸ The O&C lands are often understood to include the Coos Bay Wagon Road (CBWR) grant lands, 74,547 acres of timberland amid the O&C lands. These lands were granted in 1869 to the Southern Oregon Company to build a military wagon road between Coos Bay and Roseburg, Oregon, and returned (“reconveyed”) to federal ownership by an act of Congress in 1919 to terminate litigation over violations of the terms of the original grant. Federal administration of the O&C and CBWR lands was subject to various statutes until Congress directed management by the DOI in the O&C Act of 1937.⁹ Management was initially by the General Land Office, which was merged with the U.S. Grazing Service in 1946 to create the BLM. As with USFS timber sales, O&C timber sales declined after 1990, as shown in **Figure 1**, initially owing to protection of northern spotted owl habitat.

Payments for Counties

In 1908, Congress added a provision to the Agriculture Appropriations Act directing the USFS to give 25% of its gross receipts to the states for use on roads and schools in the counties where the national forest lands are located.¹⁰ Thus, the money is paid to the state, and the state determines how much goes toward roads and how much toward schools (or leaves some or all of the discretion to the counties).¹¹ The state also determines which programs can be funded (e.g., salaries, construction, maintenance, etc.) and which local governmental agency receives the funds (e.g., counties, townships, school districts, etc.), but the state cannot retain any of the funds, even for administrative costs. How much must be spent in each county is calculated by the USFS based on gross receipts from all sources (timber, grazing, special use permits, etc.) and acres in each county for each of the 156 proclaimed national forests.¹² The payment basis was altered in 2008 to provide 25% of a seven-year rolling average of receipts (rather than current-year receipts), to reduce annual fluctuations in payments. The USFS 25% payments to states have mandatory spending authority, and thus the payments are made automatically, unless Congress acts to alter the payments.

The O&C Act of 1937 provided for payments from the O&C lands. The act allocated 50% of receipts directly to the counties for any governmental purpose, 25% for administering the O&C lands (with any remainder returned to the Treasury), and 25% to pay the counties for accrued tax liabilities through March 1, 1938; after the accrued tax liabilities were paid, the 25% was to be used for administering the O&C lands, with any remainder provided to the counties. In practice, after the tax liabilities were paid (by 1952), all of the 25% has been used to administer the O&C lands, raising the Treasury share to 50%. Thus, the counties receive 50% of receipts. Payments

⁸ *Oregon & California Railroad Co. v. United States*, 238 U.S. 393 (1915).

⁹ Act of Aug. 28, 1937 (ch. 876, 52 Stat. 874; 43 U.S.C. §§ 1181a-j).

¹⁰ Act of May 23, 1908 (ch. 192; 35 Stat. 251), 6th unnumbered paragraph under “Forest Service” (16 U.S.C. §§ 500). Commonly referred to as the USFS 25% Payments to States Act of 1908.

¹¹ For information on state allocations of USFS payments to road and school programs, see CRS Congressional Distribution Memorandum, *Forest Service Revenue-Sharing Payments: Distribution System*, by Ross W. Gorte, November 19, 1999, available from the authors of this report.

¹² The USFS has merged many national forests for administrative and planning purposes, leading to 104 administrative units; such merged forests include the Idaho Panhandle NF (ID and MT), the Arapaho-Roosevelt NF (CO), the Apache-Sitgreaves NF (AZ and NM), the Shasta-Trinity NF (CA), the Mt. Baker-Snoqualmie NF (WA), the National Forests in Texas, the Chequamegon-Nicolet NF (WI), and many more.

for the CBWR lands were not included in the O&C Act, but were included in a later act.¹³ The program paralleled the O&C payments: the counties could effectively receive up to 50% of receipts. However, the CBWR act also directed that the payments “be computed by applying the same rates of taxation as are applied to privately owned property of similar character in such counties.” Thus, the actual payments are the county tax bills (county tax rates for assessed value of the lands), up to 50% of the receipts from the CBWR lands.

Concern over declining timber sales and thus declining payments, attributed to protecting spotted owls and other species, led President Clinton to propose a 10-year payment program to address regional economic problems resulting from protection efforts that reduced federal timber harvests in the Pacific Northwest. Congress enacted this program in the Omnibus Budget Reconciliation Act of 1993.¹⁴ For 1994, these “spotted owl payments” began at 85% of the average payments between FY1986 and FY1990, and declined by 3 percentage points annually, to 58% in FY2003.

Secure Rural Schools Act

Concerns about declining timber sales and county payments continued and expanded, especially with the declining spotted owl payments and in areas without northern spotted owls. Congress responded with a temporary, optional substitute payment program: the Secure Rural Schools and Community Self-Determination (SRS) Act of 2000. For counties that chose the SRS payments, the program provided payments at the average of the three highest payments between FY1986 and FY1999. (Some counties with USFS lands chose to continue receiving payments of 25% of gross receipts.) Under Title II of SRS, counties receiving payments of \$100,000 or more were required to spend 15%-20% of the payment on reinvestment projects (e.g., watershed improvement, wildfire fuel reduction, etc.) on the federal lands, and under Title III up to 7% could be used for additional specified purposes (e.g., search and rescue on federal lands). SRS payments were authorized for six years, FY2001-FY2006. Congress enacted a one-year extension for FY2007, then amended the SRS law in 2008. The amendment authorized a four-year extension (though FY2011) and modified the payments through a complicated formula that included the average of the three highest payments between FY1986 and FY1999, the eligible federal lands in each county, and relative per capita income in each county. The amended version also included transition payments for several states, and retained the Title II (federal land reinvestment) and Title III (special purposes) provisions of the payments.

The amended SRS payments expired at the end of FY2011, and the USFS and O&C payments will return to their previous historic levels (25% and 50% of receipts, respectively) for FY2012 unless Congress enacts an alternative payment program before September 30, 2012. There have been many issues involved in congressional efforts to reauthorize SRS, as described in CRS Report R41303, *Reauthorizing the Secure Rural Schools and Community Self-Determination Act of 2000*. One of the most significant difficulties has been the need for offsets to fund the reauthorization of the mandatory payments, and Congress continues to examine options on this issue.

One other issue relates to the payments more generally. The issue has been referred to as “linkage.” Some observers have noted that, because the counties historically received a share of

¹³ Act of May 4, 1939 (ch. 144; 53 Stat. 753).

¹⁴ P.L. 103-66; §§ 13982 and 13983.

revenues, they were rewarded for advocating revenue-generating activities (principally timber sales) and for opposing management that reduced or constrained activities that generate no revenues to the local forest (e.g., protecting commercial or sport fish harvests or designating wilderness areas). Thus, counties often allied themselves with the timber industry, and opposed environmental groups, in debates over USFS and O&C management and budget decisions. Because SRS payments were based on historic payments, and not on current agency receipts, they were seen as “de-linked” from the pressure to produce revenues—a situation desired by many environmental and conservation organizations but opposed by many user groups.

Title I of H.R. 4019

Three bills addressing USFS payments for counties have been introduced in the 112th Congress. Two, H.R. 3599 and S. 1692, would extend the SRS Act for five additional years. The other, Title I of H.R. 4019, takes a different approach, and thus warrants a separate analysis. This title of H.R. 4019 is called the County, Schools, and Revenue Trust for Federal Forest Land. It contains eight sections, described below.

Section 101. Definitions

This section contains 14 definitions. Eight are unique to this bill, including defining the Secretary of Agriculture as the “Trustee.” Two are common or defined in other sources: “State” (to include the Commonwealth of Puerto Rico, the only territory with national forest lands); and “community wildfire protection plans.” The other four include potentially conflicting definitions. “Federal lands,” for example, are defined to include the National Forest System and the O&C lands (§ 101(7)), and the “National Forest System” is then defined in the bill to exclude certain National Forest System lands (§ 101(9)). “Secretary” is defined as the Secretary of Agriculture (§ 101(10)), while “Secretary concerned” is defined as the Secretary of Agriculture for National Forest System lands and the Secretary of the Interior for the O&C lands (§ 101(11)).

Section 102. County, Schools, and Revenue Trust

This section would establish the County, Schools, and Revenue Trust.¹⁵ It would direct that the Trustee (the Secretary of Agriculture) “has a fiduciary responsibility to beneficiary counties to use ... Projects to generate amounts sufficient to satisfy the annual revenue requirements established for units of the National Forest System.” It would establish the trust with an appropriation of \$875 million and would direct that the portion of receipts from trust projects, as required in § 106(a)(1), be deposited in the trust. It also would prohibit garnishment by or payment to a county creditor; spending other than as directed in § 107; and offsetting state funding “for local schools, facilities, or educational purposes.”

¹⁵ For this report, the account is referred to as the trust, and the related projects, payments, and program are called trust projects, trust payments, and the trust program.

Section 103. Opt-Out Option

This section would allow political subdivisions of states (referred to as counties throughout the bill and this report) with National Forest System lands eligible for payments under SRS to elect not to participate; such an election would need to be submitted each year the county chooses not to participate. Counties otherwise would be automatically included in the trust program. The section would prohibit trust projects from commencing on lands in counties that have opted not to participate.

Section 104. Determination of Annual Revenue Requirement and Minimum Sale Level

This section would require the Secretary of Agriculture to determine, for each unit of the National Forest System, the annual revenue requirement for the unit and the minimum sale level for the unit. (“Unit” is not defined.) The annual revenue requirement is defined (§ 101(1)) as 60% of the “average annual gross receipts from the unit during the 20-year period beginning with” FY1980 (i.e., FY1980-FY1999).

The minimum sale level is defined (§ 101(8)) as 50% of the “average annual chargeable timber volume (as measured in net sawtimber volume) sold from the unit during the period beginning with fiscal year 1980 through fiscal year 2000” (i.e., for the 21-year period). Chargeable volume is defined (§ 101(4)) as “the volume of timber and other forest products that is counted toward meeting the allowable sale quantity of a unit of National Forest System land based on the regionally applicable utilization and merchantability standards.” Allowable sale quantity is a provision that limits USFS timber sales to “a quantity equal to or less than a quantity which can be removed from such [national] forest annually in perpetuity on a sustained-yield basis.”¹⁶ Accordingly, § 104 might cause management problems for forest supervisors for meeting the minimum sale level, if it conflicted with maintaining a perpetual supply.

Section 105. County, Schools, and Revenue Trust Projects

This section would provide for the implementation and review of projects that provide funds to be deposited in the trust. Trust projects would include any projects, but “may not exceed the number of projects necessary to meet the annual revenue requirement.” Trust projects could not occur on National Forest System lands in counties that opt out of the trust program, in components of the National Wilderness Preservation System,¹⁷ on lands where Congress had prohibited timber harvesting,¹⁸ or on lands “over which administrative jurisdiction was assumed by the Forest

¹⁶ Allowable sale quantity is an administratively established term derived from § 13 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA; P.L. 93-378), as amended by the National Forest Management Act of 1976 (NFMA; P.L. 94-588); 16 U.S.C. § 1611.

¹⁷ The Wilderness Act (P.L. 88-577; 16 U.S.C. §§ 1131-1136) established a system of federal lands designated by Congress to be managed under specified provisions that prohibited timber harvesting and most other commercial activities. For more information, see CRS Report R41649, *Wilderness Laws: Statutory Provisions and Prohibited and Permitted Uses*, by Ross W. Gorte.

¹⁸ It is unclear how this relates to limitations on timber harvesting established by Congress other than prohibitions; for example, Congress directed that “scheduled timber harvesting” be planned so as to protect wild and scenic rivers in §§ 10 and 12 of the Wild and Scenic Rivers Act of 1968 (P.L. 90-542; 16 U.S.C. §§ 1271-1287).

Service under section 311.” It is not clear to what this latter provision refers, as there is no § 311 in the bill. Section 105 also would direct that trust projects be consistent with the standards and guidelines in the NFMA plans for each National Forest System unit, but also would allow the standards and guidelines to be modified for each trust project. Thus, it is not clear what role existing land management plans would have in the proposed trust system.

Section 105(d) would provide for public review, public comments, and environmental review. Section 105(e) would direct that the provisions of this section, for implementing trust projects, are “deemed to be compliance with the requirements of” the Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA),¹⁹ the National Forest Management Act of 1976 (NFMA),²⁰ the Multiple Use-Sustained Yield Act of 1960 (MUSYA),²¹ the National Environmental Policy Act of 1969 (NEPA),²² and the Endangered Species Act of 1973 (ESA).²³ Accordingly, the reviews, appeals, and analyses offered by these statutes would be superseded by the abbreviated process within H.R. 4019.

Public Review and Comment

Section 105(d)(1) would establish a notice and comment process for trust projects. Proposed projects would require a *Federal Register* notice, and the public would have 30 days to provide written comments on the proposals. After considering the written comments, the decision-maker would be required to issue a final decision within 90 days after the end of the comment period. This would require another *Federal Register* notice, marking the start of a 30-day objection period. Only parties who submitted written comments on the proposed projects could submit written objections. However, there is no provision that would require consideration of the written objections. This process is identified as the sole means for the public to seek administrative review of trust projects.

Environmental Review

Section 105(d)(2) would require an environmental report on each proposed trust project within 180 days of the initial *Federal Register* notice, as much as 30 days after the deadline for written comments on the project’s final decision. For catastrophic events, defined as events that have caused or will cause severe damage to National Forest System lands (§ 101(3)), the deadline would be shortened to 30 days, with public comment and objection periods shortened as necessary. The environmental review would include an evaluation of environmental impacts “to the extent the Secretary considers appropriate and feasible,” including any effect on threatened or endangered plants or animals listed under ESA. The environmental review also would include the public comments and objections and any response, as well as modifications needed “to ensure the annual revenue requirement is met.” The environmental report would not be allowed to cost more than one-third of the estimated receipts generated by the project. It is not clear whether the environmental review would be published or otherwise available to the public. Finally, the environmental report would not be subject to judicial review.

¹⁹ P.L. 93-378; 16 U.S.C. §§ 1600-1616.

²⁰ P.L. 94-588; 16 U.S.C. §§ 1600-1616, et al.

²¹ P.L. 86-517; 16 U.S.C. §§ 528-531.

²² P.L. 91-190; 42 U.S.C. §§ 4321-4347.

²³ P.L. 93-205; 16 U.S.C. §§ 1531-1540.

Section 106. Distribution of Amounts from Trust Projects

This section would allocate receipts from trust projects:

- 65% would be deposited in the trust; and
- 35% would be “deposited in the general fund of the Treasury for use ... in such amounts as may be provided in advance in appropriation Acts, for the Forest Service.” Of this amount, up to 1% would be available for “performance-based cash awards ... to employees of the Forest Service who assist a unit in exceeding its minimum sale level for the fiscal year.”

Section 107. Payments to Beneficiary Counties from County, Schools, and Revenue Trust

This section would direct that all deposits to the trust be distributed to the states each year as soon as practicable after the end of the fiscal year. Section 107(a) would direct each state’s allocation “to the beneficiary counties in the manner provided by” SRS § 102(c)(1). That section of SRS directed allocations among the counties in accordance with the USFS 25% Payments to States Act and the Weeks Law.²⁴ These two laws direct the states to spend the money on roads and schools *in* the counties where the national forests are located; the money is not necessarily paid *to* the counties, and some states direct the payments to school districts or other local governmental entities. The USFS 25% payment allocation within each state is based on the receipts from each proclaimed national forest and the acreage of each county within each proclaimed forest.

Section 107 is silent concerning the allocation among the states. It could be based on the current receipts from each proclaimed national forest, as is done under the USFS 25% Payments to States Act and the Weeks Law. However, it also could be based on the complicated formula in SRS, based on each county’s share of historic receipts and of eligible lands, adjusted by relative per capita income.

Section 107(b) would direct use of the trust payments in accordance with SRS §§ 102(c)(2) and (d). SRS § 102(c)(2) directed use of payments in accordance with the USFS 25% Payments to States Act and the Weeks Law—that is, on roads and schools as determined by each state. SRS § 102(d) required that, for counties with payments greater than \$350,000 in a fiscal year, 80%-85% of the payment must have been used in accordance with § 102(c)(2). Up to 7% of the remainder could be used for certain projects, as specified in SRS Title III (e.g., for search-and-rescue or for local wildfire protection). The remaining funds were to be used as specified in SRS Title II—reinvested in projects on the federal lands in accordance with recommendations of local resource advisory committees (RACs) and approval of the Secretary. Counties with smaller annual payments were excused from some or all of allocation to Title II and Title III projects. Section 107(b) is silent on whether the Title II projects can be done as trust projects in accordance with the implementation provisions of § 105.

²⁴ Act of March 1, 1911 (ch. 186, 36 Stat. 961; 16 U.S.C. § 500).

Section 108. Initial Payments Pending Implementation of Trust Projects

This section would direct allocations of the appropriations provided to the trust for the first two fiscal years. For FY2012, the Secretaries would make payments to beneficiary counties equal to the FY2010 SRS payments. For FY2013, the payments would be 75% of the FY2012 payments. The payments would be used in accordance with the provisions directed in § 107(b).

Analysis of Possible Issues for Congress

Title I of H.R. 4019 raises many possible issues for Congress. The bill would shift the focus of management for some federal lands to generating revenues for counties, possibly at the expense of providing benefits to the American people for current and future generations, but also possibly creating jobs in the timber industry. It would presume that the new management focus complies with many existing statutes that require informing the public about possible impacts of decisions and alternatives (NEPA), protecting rare plants and animals (ESA), and assuring sustained forest ecosystems (NFMA). This would effectively eliminate the external enforcement of these provisions for projects on many federal lands. There are also many technical implementation questions. Specific issues are discussed below.

In addition, while it appears that H.R. 4019 is intended as a substitute for USFS 25% payments to states and O&C 50% payments to counties, nowhere does the bill direct that these payments not be made. Thus, the trust payments would apparently be in addition to the USFS 25% and O&C 50% payments. However, the bill includes no direction on deposits to the National Forest Fund to make the USFS 25% payments.

Fiduciary Trust Responsibilities and Federal Assets

The bill would establish a fiduciary responsibility to the Secretary of Agriculture as trustee for the trust. Typically, a trust is a collection of assets to be administered by its trustee for the beneficiaries, typically to provide income while preserving the assets of the trust. The beneficiaries of the income and of the assets can differ; for example, some trusts are established to provide a surviving spouse with income while maintaining the assets for the children.

In H.R. 4019, the trust is defined as the income, not as the assets. The bill would establish a responsibility to produce income, but is unclear on the responsibilities of the agency and the means citizens might have to protect the assets—the federal lands and resources. H.R. 4019 would constrain some of the opportunities to challenge management decisions on trust projects to produce income for the counties. It is not clear whether the trust requirements to manage for income to the counties would outweigh long-term management to maintain the assets.

The counties would be the principal beneficiaries of the trust, but would appear to bear few of the responsibilities or costs associated with the implementation and administration of the trust. That is, the costs to prepare and administer trust projects to produce income for the counties are borne by the federal government. In addition to the costs of the trust projects, there would also likely be costs to establish and administer the trust, also borne by the federal government. While 35% of the receipts from trust projects could be made available in advance in appropriations acts, it is unclear whether this funding would be sufficient to cover the costs of implementing the trust

projects and administering the trust. It is also unclear whether this funding would be supplemental to or in lieu of annual appropriations.

Annual Revenue Requirements

H.R. 4019 would establish an annual revenue requirement of 60% of the average annual gross receipts from each National Forest System unit between FY1980 and FY1999. This provision raises a number of potential questions for Congress. For example, it may be unclear to some why 60% of annual gross receipts from FY1980 through FY1999 was selected for the bill; the committee and subcommittee press releases and statements from the chairmen do not include explanations for either the level or the selected period. (The eligibility period under SRS was FY1986 through FY1999.) Other possible questions include what would be included in “gross receipts”; what receipts would be available to make the specified payments; what additional receipts would be needed to make the specified payments; and where those receipts might come from.

Gross Receipts

The bill does not define “gross receipts.” For USFS 25% payments to states, “gross receipts” include some receipts but not others. For example, timber purchaser deposits to the Knutson-Vandenberg (K-V) Fund and deposits in the Salvage Timber Sale Fund are included as receipts for USFS 25% payments.²⁵ In contrast, timber purchaser deposits for brush disposal, fees for forest botanical product harvests, and recreation fees under the Federal Lands Recreation Enhancement Act are exempt from the USFS 25% payments.²⁶ Thus, the basis for calculating the 60% of gross receipts is unclear. If the gross receipts subject to the annual revenue requirement in the bill were the average gross receipts from FY1980 through FY1999 used to determine the USFS 25% payments to states, then the annual revenue requirement nationally would likely be about \$550 million to \$600 million. However, the actual annual revenue requirement could be higher or lower than this estimate, depending on a host of estimates and assumptions about options and future receipts.

Receipts Available for Deposit to the Trust

The above discussion of gross receipts suggests several categories of receipts that could be deposited in the trust. One category of receipts that could be deposited in the trust are those currently deposited in the National Forest Fund (NFF). This is a receipt account that accumulates USFS receipts which are not deposited directly into an account with mandatory spending

²⁵ Deposits to the K-V Fund (Act of June 6, 1930; ch. 416, 46 Stat. 527; 16 U.S.C. §§ 576-576b) were defined as receipts for receipt-sharing in § 16 of NFMA, even though up to 100% of timber sale receipts can be deposited in the fund. Similarly, deposits to the Salvage Sale Fund (NFMA § 14(h); 16 U.S.C. § 472a(h)) were defined as receipts for receipt-sharing in the 6th unnumbered paragraph under “Administrative Provisions, Forest Service” in P.L. 102-381 (Department of the Interior and Related Agencies Appropriations Act for FY1993), even though up to 100% of timber sale receipts can be deposited in the fund.

²⁶ See the authorizing language in each of the relevant statutes: respectively, Act of August 11, 1916 (ch. 313, 39 Stat. 446; 16 U.S.C. § 490); P.L. 106-113 (Consolidated Appropriations Act for FY2000), Appendix C, § 339 (16 U.S.C. § 528 note); and P.L. 108-447 (Consolidated Appropriations Act for FY2005), Division J, Title VIII (16 U.S.C. §§ 6801-6814).

authority (an MSA).²⁷ Congress has directed many of the NFF funds to be used for specific purposes, such as the 10% Roads and Trails Fund. The USFS has historically reported on NFF deposits in its annual budget justification, although that table was not included in the FY2013 budget justification. Many of the various land and resource uses generate receipts:

- Timber sales—\$18.8 million annually for FY2008-FY2010, after deducting the mandatory spending from NFF deposits (\$7.6 million annually).
- Grazing fees—\$1.9 million annually for FY2008-FY2010, after deducting the mandatory spending from NFF deposits (\$3.3 million annually).
- Minerals—\$45.3 million annually for FY2008-FY2010, after deducting the mandatory spending from NFF deposits (\$0.2 million annually). Of this amount, \$44.0 million annually for FY2008-FY2010 was collected by the Minerals Management Service (MMS) in the U.S. Department of the Interior (now the Office of Natural Resource Revenues) and deposited in the NFF; because the collections are not USFS receipts, it is not certain whether they can be identified as trust projects and deposited in the trust.
- Recreation fees—\$44.2 million annually for FY2008-FY2010, after deducting the mandatory spending from NFF deposits (\$7.6 million annually). This does not include recreation fees under the Federal Lands Recreation Enhancement Act (FLREA), since these collections are deposited directly into an MSA.
- Fees for land uses and power—\$16.9 million annually for FY2008-FY2010, after deducting the mandatory spending from NFF deposits (\$3.3 million annually).

Thus, NFF funds for FY2008-FY2010 that could have been available for the trust would have averaged \$127.1 million annually, if MMS deposits were included, or \$83.1 million annually, if the MMS were not included.

One possible source of funds for the trust could be funds deposited in many of the MSAs. It is unclear whether the provisions of H.R. 4019 could override previous statutes on the disposition of receipts to the MSAs. For certain accounts associated with timber sales, the USFS determines the amount deposited (if any) in each of the MSAs. These accounts include:

- The Knutson-Vandenberg (K-V) Fund—\$101.9 million annually for FY2008-FY2010. These funds are a portion of timber sale receipts currently used for reforestation, timber stand improvement, and mitigation and enhancement of other resources in timber sale areas.
- The Salvage Sale Fund—\$27.0 million annually for FY2008-FY2010. These funds are a portion of timber sale receipts currently used to prepare and administer additional salvage timber sales.
- Brush Disposal—\$7.5 million annually for FY2008-FY2010. These funds are additional deposits from timber purchasers currently used to clean up the “slash” (tree tops and limbs) in timber sale areas.

²⁷ For a description of the USFS MSAs, see CRS Report RL30335, *Federal Land Management Agencies' Mandatory Spending Authorities*, coordinated by Ross W. Gorte.

- Stewardship Contracting retained receipts—\$5.5 million annually for FY2008-FY2010. Stewardship contracts are special timber sales where the USFS is authorized to require additional land and resource treatments in exchange for lower timber payments; the USFS is also authorized to retain any receipts generated by stewardship contracts to be used for additional stewardship contracting activities.

Because the USFS determines the amount deposited in the first three of these accounts, and can choose not to undertake stewardship contracting, the agency could substantially expand the funds available for the trust. The K-V and Salvage Sale Funds could be directly deposited in the trust, while reducing or halting the use of brush disposal and stewardship contracting would likely increase the bid prices for USFS timber sales.²⁸ The total amount available from these accounts that could have been available for the trust averaged \$141.9 million annually for FY2008-FY2010.

Funds directed to be deposited into other MSAs might also be diverted to the trust. The statutes establishing these many MSAs direct the deposit of specified receipts into these accounts. However, the USFS might be able to designate the activities generating these receipts as trust projects, shifting funds from the MSAs to the trust. The total amount available from these accounts that could have been available for the trust averaged \$124.0 million annually for FY2008-FY2010. While many of the accounts are relatively modest (less than \$5 million annually), two accounts are relatively large:

- Recreation fees under FLREA—\$64.4 million annually for FY2008-FY2010. These funds have been used primarily to address the \$5.5 billion backlog of deferred maintenance in the national forests.
- The 10% Roads and Trails Fund—\$14.0 million annually for FY2008-FY2010. These funds were originally set aside to supplement appropriations for road construction; at various times, they have been returned to the U.S. Treasury to offset USFS road appropriations, although for several years they were authorized to be used for other forest health activities in the national forests.

There are a few MSAs that are unlikely to be available for the trust. These accounts include funds for specific purposes that would not have been deposited into the accounts without use for those purposes. The largest account is Restoration of Lands and Improvements, which accumulates recoveries from cash bonds, forfeitures, judgments, settlements, and the like from contractors who fail to complete the required work; the funds are used for others to complete the work. Similarly, the Cooperative Work account includes deposits from contractors and cooperators for commensurately funding jointly beneficial work (e.g., USFS expenditures to maintain jointly used roads). The total amount from these accounts averaged \$67.7 million annually for FY2008-FY2010, but would probably not be available for the trust.

²⁸ Reducing required deposits for brush disposal or additional contract requirements in stewardship contracts would allow timber purchasers to bid more for the timber itself, although the rise in timber prices might be less than the reduced costs in areas with little or no competitive bidding for federal timber.

Additional Receipts Needed

The discussion of sources suggests that current NFF receipts could provide about \$83 million to \$127 million annually, depending on the availability of the MMS deposits. Reducing or eliminating the use of the several timber-related MSAs, and depositing those receipts in the trust, could generate another \$142 million annually. Shifting deposits from the other MSAs, excluding the last group (whose funds likely would not be available for the trust), could add another \$124 million to the trust. Thus, if the USFS chose (and were able) to designate all these activities as trust projects and deposit all the receipts in the trust, total deposits in FY2008-FY2010 could have been as much as \$349 million to \$393 million annually.

As described above, the trust would likely need receipts of about \$550 million to \$600 million annually. If only current NFF receipts were deposited in the trust, additional annual requirements could range from \$423 million to \$517 million. As NFF deposits from timber harvests averaged \$18.8 million annually for FY2008-FY2010, timber sales would need to increase by more than 20 times above the average timber harvest level of FY2008-FY2010 (2.6 billion board feet (bbf)) to generate sufficient funds. This could lead to annual USFS timber harvests increasing to as much as or more than the current annual timber harvest level from all lands (federal and nonfederal) in the United States. Thus, the USFS would have to alter the way it has been selling timber and/or allocating receipts.

If the timber receipts deposited in the timber-related MSAs were allocated to the trust as receipts from trust projects, the need for additional annual requirements would be reduced. NFF and timber-related MSA deposits averaged about \$161 million for FY2008-FY2010. Thus, the additional funds needed for the trust would be about \$281 million to \$375 million. With this allocation, timber sales would need to increase by more modest, but still substantial, amounts—about 175% to 233% above current levels. This would imply USFS sale levels of about 7.2 bbf to 8.7 bbf. While roughly triple the harvest levels of the past 20 years, these would be within historic levels. (See **Figure 1**, above.)

If all activities that provide funds for MSAs were designated to be trust projects, the additional annual requirements would be reduced to about \$157 million to \$251 million. Using additional timber receipts (deposits to the NFF and timber-related MSA deposits, about \$161 million annually for FY2008-FY2010) would require increasing timber sales between 98% and 156%, 5.1 bbf to 6.7 bbf, double or more the FY2008-FY2010 average of 2.6 bbf.

Where the Receipts Might Come From

Additional Timber Sales

Interests disagree about whether such increased timber sales are feasible and desirable. One question is whether sufficient timber exists in the national forests to provide the necessary additional receipts for the annual revenue requirements. Timber inventory data show that softwood growing stock on all forest lands increased by 23% between 1953 and 2007, and by 18% in the national forests.²⁹ The increase has largely been in medium-sized trees (7-17 inches in

²⁹ The timber inventory data are from W. B. Smith et al., *Forest Resources of the United States, 2007*, USDA Forest Service, Gen. Tech. Rept. WO-78, Washington, DC, 2009, pp. 209-211, 249-251 (Table 18 and Table 29), http://www.fs.fed.us/nrs/pubs/gtr/gtr_wo78.pdf. The data show forest acreage, growing stock (commercially usable (continued...))

diameter), while the inventory in large trees (more than 29 inches in diameter) has declined, especially in the Pacific Coast states (Alaska, Washington, Oregon, and California).

The national forests contain more timber now than when harvest levels were much higher, and timber growth exceeds harvests and mortality, so timber inventories will continue to grow. This is true even with extensive wildfires and insect infestations (e.g., mountain pine beetles) in recent years. This suggests that, biologically, more timber could be cut from the national forests, at least in the near term and especially in salvaging trees killed by fires, insects, or diseases. However, salvage timber and the smaller average tree diameter suggest lower values for the remaining timber. Furthermore, in some areas of the Rocky Mountains, sawmill capacity has declined substantially in the past 20 years, raising questions about whether sufficient markets exist for increased federal timber harvests.³⁰

If additional timber were harvested under the bill, additional jobs would likely be generated in the timber industry. Job multipliers based on timber harvests are imprecise, because they are influenced by many factors, such as tree diameters, mill characteristics, and more. One meta-study on northern spotted owl impacts in 1990 showed timber job multipliers ranging from 6 to 26 direct and indirect jobs per million board feet harvested, although most ranged from 14 to 16 jobs per million board feet.³¹ More recent studies have suggested that timber job multipliers are now lower—11.28 jobs per million board feet in Washington in 2004.³² If the additional timber sales estimated above (5.1 to 8.7 billion board feet) were achieved, the 2004 multiplier would suggest additional direct and indirect timber industry jobs of 57,000 to 98,000 jobs.

The USFS likely could adjust its timber practices to provide at least some of the annual revenue requirement. As implied above, significant additional receipts could come from receipts that previously were being deposited in the K-V, Salvage, and brush disposal funds and were being used in stewardship contracts. Because the level of deposits and use of stewardship contracts are within the agency's discretion, shifting these funds to the trust is feasible. However, additional appropriations would likely be needed to accomplish the tasks now being supported by these

(...continued)

trees of at least 5 inches in diameter) volume, and timber growth, harvest, and mortality. In the Pacific Coast states (Alaska, Washington, Oregon, and California), softwood growing stock declined between 1953 and 2007 by 10% on all forest lands and by 9% in the national forests, although it rose between 1987 and 2007 (by 7% for all lands and by 9% for national forests); these data reflect the logging of old-growth timber during the 1960s, 1970s, and 1980s. In the Rocky Mountain states (the rest of the West), softwood growing stock increased substantially—by 43% on all lands and by 67% in the national forests between 1953 and 2007. Softwood growing stock has also been changing in size (diameter). The increased inventory since 1953 has been predominantly in trees between 7 and 17 inches in diameter (small sawtimber) in all regions. In contrast, the inventory of trees greater than 29 inches in diameter (large sawtimber) declined everywhere, by 37% nationally, although by only 5% in the Rocky Mountain states.

³⁰ Data on numbers of sawmills are not reported. However, in 1980, there were sufficient data for the Western Wood Products Association (WWPA) to report sawmill profiles for 11 western states. By 2010, WWPA was only able to report sawmill profiles for 5 western states—Washington, Oregon, California, Idaho, and Montana—because too few mills existed in the other states to report without disclosing company-specific data. (WWPA, *Statistical Yearbook of the Western Lumber Industry*, annual series.)

³¹ See out-of-print CRS Report 92-922 ENR, *Economic Impacts of Protecting Spotted Owls: A Comparison and Analysis of Existing Studies*, by Ross W. Gorte, available from the authors of this report.

³² C. L. Mason and B. R. Lippke, *Jobs, Revenues, and Taxes from Timber Harvest: An Examination of the Forest Industry Contribution to the Washington State Economy*, Rural Technology Initiative, College of Forest Resources, University of Washington, Working Paper 9, Seattle, WA, September 2007, <http://www.ruraltech.org/pubs/working/09/index.asp>.

funds—reforestation, timber sale preparation, treatment of logging debris to reduce wildfire threats, and more.

The USFS also could likely shift timber harvests to emphasize the remaining large-diameter timber (or at least the largest-diameter trees that remain). This could lead to ecological problems, however. For example, one of the contributing factors in the forest health and wildfire problem of the intermountain West has been the historic emphasis on logging large-diameter pines. Cutting more of the large-diameter trees and leaving the small trees, undergrowth, and debris exacerbates wildfire threats. Increased logging does not reduce wildfire threats because it puts more dead biomass at ground level, which makes fires more difficult to control, and leaves small trees to serve as fuel ladders to carry fires into the canopy; this could lead to catastrophic wildfires.³³ Another potential ecological problem could be degraded forest conditions. It has long been recognized that harvesting the best trees, and leaving the poorer-quality trees, is not desirable in the long run; this approach is called “high-grading” the forest, and is generally regarded as a poor forest management practice. Because harvests account for a relatively small acreage in any one year, and because on-the-ground inventories occur only periodically, it could be decades before the extent of high-grading were known, and it would take decades, if it were even feasible, to restore the forests to healthy conditions after such practices occur. In addition, the loss of large-diameter trees would likely alter the composition of wildlife populations.

Finally, it would also be possible to harvest additional timber in some national forests, and use those revenues to provide the trust payments to other counties. Only receipts from trust projects would be deposited in the trust, and trust projects could only occur in counties that did not opt out of the trust payment program. However, all trust project receipts would be deposited in the trust, and the allocation to counties in the trust payment program would not be based on where those receipts were generated. Thus, the USFS could emphasize timber sales in areas with high timber values, such as in the Allegheny National Forest (PA) and in the south Atlantic and Gulf coastal national forests. For example, two of the four counties that have Allegheny NF land opted for SRS payments, while the other two opted for the USFS 25% payments. If those two counties opted for trust payments, the USFS could expand timber sales in those two counties to make trust payments in other areas. This is significant, because the value of USFS timber in the Allegheny in 2010 was 20 times greater (per thousand board feet) than in Colorado or Nevada.

Other Possible Sources of Revenues

Much of the attention on H.R. 4019 has been on increased timber sales to provide the additional revenues for the trust. However, the bill would not limit revenues to timber sales. Specifically, § 105(b)(2) also included “issuance of a grazing permit, issuance of a special use permit involving land use, mineral development, power generation, or recreational use, and projects implementing a community wildfire protection plan.” Livestock grazing is unlikely to provide much revenue, as the administrative fee for grazing use (there is no fee for a grazing permit) is set under a formula originally enacted in law, and administrative efforts to raise grazing fees have been controversial.³⁴ Potential revenues from community wildfire protection plan projects would also likely be modest, at best. Biomass removal for wildfire protection generally involves

³³ See CRS Report R40811, *Wildfire Fuels and Fuel Reduction*, by Ross W. Gorte.

³⁴ See CRS Report RS21232, *Grazing Fees: Overview and Issues*, by Carol Hardy Vincent. The formula for establishing federal grazing fees was authorized in the Public Rangelands Improvement Act of 1978 (P.L. 95-514; 43 U.S.C. §§ 1901-1908). It expired in 1985, but the formula has continued to be used by the past five Administrations.

removing biomass on or near the ground, such as underbrush and small trees.³⁵ Such biomass has little or no commercial value. While the biomass could have some value for energy production, such use to date has required federal and state subsidies to be viable, and no independent commercial biomass energy facilities using biomass from forests are currently in operation.

Special use permits, however, could offer more opportunities. Special use permits are employed for a wide variety of activities in the national forests, such as ski areas, commercial filming, and commercial telecommunication sites. The USFS generally seeks to recover fair market values for special use permits. New or higher fees for renewable energy production, such as from wind or solar farms, could be a possible source of revenues, although the capacity to generate fees from these sources and the possible environmental and social impacts from renewable energy farming continue to be studied. Other activities for which special use permits might be required could include other uses for which the USFS is not prohibited from charging fees. For example, under FLREA, some recreational activities cannot be charged user fees, such as parking and picnicking, camping at undeveloped sites, and hunting and fishing “for any person who has a right of access for hunting or fishing privileges under a specific provision of law or treaty.” However, other recreational users could be charged a fair market price for special use permits, such as for hunting and fishing for persons lacking a right of access, for using all-terrain vehicles or snowmobiles off roads, for commercial outfitters and guides, and more. The amount of possible revenues from such special use permits is unknown, and in remote areas, the cost to collect and enforce the fees may exceed the potential receipts. In addition, it seems likely that most of the burden of the fee increases would be borne by people living closest to the national forests and those living in the counties to which these revenues would be transferred.

Effects If Annual Revenue Requirements Are Not Met

The bill provides no penalties or guidance on consequences for not meeting the annual revenue requirements.

Public Involvement and Environmental Reporting

Section 105(d)(2) would require an environmental report for each proposed trust project. The report must be produced within 180 days of the *Federal Register* notice on the proposed trust project, meaning that the USFS could issue a report 30 days after the deadline for written comments on its final decision.

Thus, H.R. 4019 appears not to provide a notice-and-comment process on the environmental report for either the public or other agencies. Furthermore, in cases of catastrophic events, the USFS would be required to produce the environmental report within 30 days of the notice of the proposed project and permitted to shorten the public comment period on the trust project. H.R. 4019 does not identify any penalties or consequences if the USFS fails to meet the specified deadlines.

Under current law, non-trust timber sales require an environmental review under NEPA and an ESA consultation with either the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) about the sale’s impacts on listed species and critical habitat. Section

³⁵ See CRS Report R40811, *Wildfire Fuels and Fuel Reduction*.

105(e), however, would exclude trust projects from NEPA and ESA compliance. Moreover, H.R. 4019's requirements suggest that the environmental report would not be a functional equivalent of a review under NEPA or a biological assessment under ESA. The "minimum" contents of the report would be:

- an evaluation of the environmental impacts, including the effect on threatened or endangered species, to the extent "appropriate and feasible";
- public comments and objections and "any response" to them; and
- any modifications to the project to ensure annual revenue is met.

Section 105 would expressly ban judicial review of the report and would limit administrative review to an opportunity to submit objections to the trust project final decision; however, H.R. 4019 would not require USFS to review or respond to the objections. Thus, the rationale for preparing the report is unclear, as it does not appear to inform the USFS or the public of the consequences of a trust project in a timely manner, nor would it arguably provide agencies or the public an adequate opportunity to comment meaningfully on the report.

If H.R. 4019 were enacted, review could not be forced under many other statutes pertaining to timber harvests. The bill states that compliance with § 105 would be deemed as compliance with the requirements of the Multiple Use-Sustained Yield Act, the National Environmental Policy Act, the Endangered Species Act, the Forest and Rangeland Renewable Resources Planning Act, and the National Forest Management Act. It is not clear how NFMA § 14 could be satisfied by the environmental report, as that law pertains to bidding, contracting, and harvesting practices.³⁶ However, it appears to mean that, under H.R. 4019, timber harvests for trust projects would not need to be made at appraised value or overseen by federal employees.

The possibility of litigation related to trust projects would not be entirely precluded by H.R. 4019. Courts could be asked to review violations under several laws, including the Clean Water Act,³⁷ the Clean Air Act,³⁸ the National Historic Preservation Act,³⁹ and the Archaeological Resources Protection Act.⁴⁰

In addition, by barring ESA consultation, H.R. 4019 could potentially expose companies performing trust projects to liability. The consultation process under ESA typically leads to either FWS or NMFS issuing what is called an incidental take statement, immunizing the agency and any applicant from liability if the project incidentally harms a listed species.⁴¹ By eliminating the consultation process in this way, § 105(e) insulates the USFS from ESA liability, but does not appear to protect private parties, such as timber companies, from suit.

³⁶ 16 U.S.C. § 472a.

³⁷ P.L. 92-500; 33 U.S.C. §§ 1251 et seq.

³⁸ P.L. 95-95; 42 U.S.C. §§ 7401 et al.

³⁹ P.L. 96-515; 16 U.S.C. §§ 470 et seq.

⁴⁰ P.L. 96-95; 16 U.S.C. §§ 470aa-470mm.

⁴¹ 16 U.S.C. § 1536(B)(4).

Allocation and Distribution of Trust Payments

The bill would allocate 65% of trust project receipts to the trust. This would be a significant increase from the historic allocation—25% of USFS receipts and 50% of O&C receipts. The trust payments would be allocated by the states to the counties in accordance with SRS § 102(c)(1), which refers to the original USFS 25% payments to states. This clearly would direct allocations for roads and schools in the counties based on revenues from each proclaimed national forest and acreage of that national forest in each county; the payment may or may not go to the county, depending on each state’s statutory direction.

How the trust payments would be allocated among the states is not clear. The allocation could be based on the average 1980-1999 USFS revenues in each state; this is shown in the fifth column in **Table 1** (under “Calculated Payments, Historic Allocation”).⁴² **Table 1** shows the historic USFS payments: the second column shows the average annual payments for 1980-1999; the third column shows the average annual payments for 2001-2007; and the fourth column shows the average annual payments for 2008-2011. Because the bill refers to the distribution in SRS as amended, the allocation of the trust payments could be based on the allocation of SRS payments in each state; this calculated allocation is shown in the sixth column in **Table 1**.⁴³

The allocation among states—by historic payments or SRS formula—would make a substantial difference in state payments. If the allocation were based on historic payments, trust payments would rise from the SRS 2008-2011 average annual payments in a few states, notably Oregon, Washington, and California. In fact, the average annual trust payments in California would likely exceed the average annual payments for any of the preceding periods. In contrast, if the allocation were based on the SRS formula, trust payments would decline from the SRS 2008-2011 average annual payments in many states, especially western states with large land areas but modest historic receipts, such as Arizona, Colorado, Idaho, Montana, Nevada, Utah, and Wyoming.

In addition, because the payments would be distributed “subject to” SRS §§ 102(c)(2) and (d), counties where the payments exceed the specified amounts must or may (depending on the level and the circumstances) allocate 15%-20% of their payments for projects in accordance with SRS Titles II and III. Thus, the amounts shown in the fourth and fifth data columns overstate the likely payments in many of the counties opting for the trust payment program. For counties opting out of the trust payment program, if current receipts were significantly higher than their 1980-1999 average receipts, the actual payments could be higher than shown in the table. The trust payments also appear to be in addition to the USFS 25% payments, which would lead to greater payments (perhaps substantially greater) in some areas.

⁴² This column equals the 65% payment of annual revenue requirement, which equals 60% of the average annual receipts for 1980-1999 (= 4 times column 2, adjusted for the Owl Payments in Washington and Oregon).

⁴³ This column equals the 65% payment of the national total annual revenue requirement (the total for column 5) times each state’s share of the SRS average annual payment, 2008-2011 (= each state’s average payment divided by the national total at the bottom of column 4).

Table I. Average and Calculated USFS Annual Payments, by State

(in dollars)

	Average 25% Payment, 1980-1999	Average SRS Payment, 2001-2007^a	Average SRS Payment 2008-2011^b	Calculated Payment, Historic Allocation	Calculated Payment, SRS Allocation
Alabama	1,488,717	2,075,265	2,170,788	2,322,398	1,995,326
Alaska	3,860,066	9,088,096	17,862,878	6,021,703	16,419,040
Arizona	4,488,276	7,220,552	15,625,872	7,001,711	14,362,848
Arkansas	5,227,385	6,819,198	8,189,822	8,154,721	7,527,847
California	45,361,694	63,616,815	49,494,650	70,764,243	45,494,048
Colorado	3,633,940	5,996,549	16,149,657	5,668,947	14,844,297
Florida	1,725,797	2,436,086	2,758,006	2,692,243	2,535,079
Georgia	868,837	1,265,554	1,783,779	1,355,386	1,639,598
Idaho	12,543,729	20,621,665	32,781,951	19,568,217	30,132,219
Illinois	99,636	295,221	106,831	155,431	98,196
Indiana	76,431	126,352	322,140	119,232	296,102
Kentucky	396,492	580,340	2,375,536	618,527	2,183,524
Louisiana	2,855,389	3,637,394	2,389,717	4,454,407	2,196,558
Maine	29,860	40,205	88,776	46,581	81,600
Michigan	1,709,960	2,604,516	4,193,001	2,667,537	3,854,085
Minnesota	1,086,970	1,975,389	3,099,736	1,695,673	2,849,188
Mississippi	6,094,110	7,947,293	7,291,737	9,506,811	6,702,353
Missouri	1,726,648	2,641,832	4,275,925	2,693,572	3,930,307
Montana	8,648,043	12,787,744	24,156,509	13,490,948	22,203,963
Nebraska	40,737	46,161	418,420	63,549	384,600
Nevada	329,663	441,846	4,939,800	514,274	4,540,521
New Hampshire	439,611	479,327	603,829	685,793	555,022
New Mexico	1,587,011	2,231,740	15,659,490	2,475,737	14,393,749
New York	5,705	14,039	27,100	8,900	24,909
North Carolina	766,760	990,562	2,224,327	1,196,146	2,044,536
North Dakota	77	98	806	120	741
Ohio	88,564	75,325	329,960	138,159	303,289
Oklahoma	741,136	1,241,571	1,159,306	1,156,172	1,065,601
Oregon	109,424,123	145,056,621	106,941,284	138,004,031	98,297,330
Pennsylvania	3,377,462	5,768,269	4,325,544	5,268,841	3,975,915
South Carolina	2,124,756	3,188,849	2,346,850	3,314,620	2,157,157
South Dakota	1,880,203	3,763,028	2,659,932	2,933,116	2,444,933
Tennessee	418,880	543,608	1,419,527	653,453	1,304,788

	Average 25% Payment, 1980-1999	Average SRS Payment, 2001-2007^a	Average SRS Payment 2008-2011^b	Calculated Payment, Historic Allocation	Calculated Payment, SRS Allocation
Texas	3,079,676	4,552,606	3,332,525	4,804,295	3,063,160
Utah	1,287,934	1,973,408	13,262,498	2,009,177	12,190,504
Vermont	185,867	367,753	400,926	289,953	368,520
Virginia	580,269	876,676	2,044,701	905,220	1,879,430
Washington	30,658,521	41,490,084	30,863,755	37,338,243	28,369,070
West Virginia	912,926	1,949,023	2,185,209	1,424,164	2,008,581
Wisconsin	968,364	1,753,942	2,600,654	1,510,648	2,390,445
Wyoming	1,512,294	2,291,636	5,217,656	2,359,178	4,795,918
Puerto Rico	15,453	41,969	186,354	24,107	171,291
Total	262,347,971	370,914,205	398,267,758	366,076,185	366,076,185

Source: CRS calculations from USFS data in annual ASR 10-I reports.

Note: Excludes possible trust payments for the O&C lands. Also, this payment is apparently in addition to the USFS 25% payments to states and O&C 50% payments to counties.

- a. The average annual payments for FY2001-FY2007 were made under the original SRS Act formula, for those opting for the SRS program, and under the USFS 25% program, for all others.
- b. The average annual payments for FY2008-FY2011 were made under the formula in the SRS Act as amended, for those opting for the SRS program, and under the USFS 25% program, for all others.

The bill also would allocate 35% of receipts to the U.S. Treasury, and would allow the funds to be appropriated to the USFS. For trust project receipts appropriated to the USFS, the agency would be allowed to use up to 1% of that appropriation for bonuses to employees “who assist a unit in exceeding its minimum sale level for the fiscal year.” This bonus would reward employees who help in increasing timber sales, regardless of the environmental and economic consequences of those sales, since it would be for exceeding volume targets, not for achieving revenue requirements. Efforts to increase receipts from other sources (such as those described above) would not be eligible for bonuses.

Implementation

The implementation of H.R. 4019 also raises a number of possible issues. Some issues may appear to be relatively minor; for example, grazing fees are charged for actual use, not for permits (as implied in § 105(b)(2)), and chargeable volume (§ 101(4)) in some national forests is calculated in growing stock (cubic feet), not in merchantable sawtimber (board feet), making the minimum sale level calculation (§ 104(2) from the definition in § 101(8)) difficult, at best. Six implementation provisions could raise more complicated issues and warrant some additional discussion: the provision on state education funding; inclusion of the O&C lands; implementation in parts of national forests; directions on timber sale practices and procedures; the need for regulations for implementation; and impacts on USFS staffing and funding.

Provision on State Education Funding

Section 102(c)(3) would direct that the “assets of the Trust shall not ... be used in lieu of or to otherwise offset State funding sources for local schools, facilities, or educational purposes.” This provision appears to be intended to prevent states from adjusting their allocation of state educational funds in response to USFS state payments, as is currently done in Washington and other states. Some might view this as federal interference in state prerogatives to allocate state funding as the state sees fit, which would violate the Spending Clause/Tenth Amendment of the U.S. Constitution. Others would likely argue that this is a legitimate condition of the federal trust payments.⁴⁴ While the language of § 102(c)(3) appears to make this a requirement only for counties choosing the trust payments, the automatic opt-in provision (§ 103) and the allocation and distribution provisions (§§ 106 and 107) make this appear less of a voluntary grant program.

Inclusion of the O&C Lands

The bill would include payments for the O&C lands in western Oregon through the definition of federal land (§ 101(7)(B)). However, some of the actions required by the bill would not be applied to the O&C lands. The provisions of § 105, implementing the trust projects, direct the Secretary of Agriculture to identify trust projects on National Forest System lands. There are no directions for the Secretary of the Interior to identify trust projects on O&C lands, and no authorization for the trust project designation, public involvement, or environmental review provisions to be implemented on the O&C lands. Section 106 would direct that trust project revenues be deposited in the U.S. Treasury to be available for appropriation to the USFS. Finally, § 107 would direct use of the funds consistent with SRS § 102(c), which refers to the USFS 25% Payments to States Act requiring use of funds for roads and schools; under the 1937 O&C Act, the O&C payments have been available for any local governmental purpose. Thus, the bill includes the O&C lands in its definition of federal land, but other provisions of the bill seem not to apply to the O&C lands and it is not clear whether the counties with O&C lands would be eligible for trust payments.

Implementation for Parts of National Forests

The bill would allow each county to opt out of the trust payment program, and would prohibit trust projects from occurring on lands in counties that have opted out of the program. However, calculations and decisions would generally be directed to be done at units of the National Forest System. These two aspects could significantly complicate national forest management. First, the bill does not define “unit” of the National Forest System. NFMA allows multiple national forests to be combined for planning purposes, and the USFS has combined several national forests for administrative purposes; for example, the Choctawhatchee National Forest (NF), with 743 acres, is administered with three other national forests as the National Forests in Florida. However, the USFS 25% payments to states program is organized by proclaimed national forest, not by administrative designation. The bill is not clear on which of these approaches may or must be used for the required calculations and decisions.

⁴⁴ See CRS Report RL30315, *Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power*, by Kenneth R. Thomas.

An additional possible complication is that some national forests are spread over many counties; the Mark Twain NF, for example, has land in 29 counties in Missouri, while the Daniel Boone NF and Jefferson NF each have land in 22 counties, the latter in three different states. Under the SRS payment program, counties could opt in, and in 38 of the 156 proclaimed national forests (24%), some counties opted in while others opted out. If similar choices were made under the trust payment program, about a quarter of the national forests would be required to administer some lands with trust projects and their implementation guidance, and other lands under MUSYA, NFMA, and other laws. This might require additional surveying, to assure that trust projects occur only in those counties that have not opted out of the trust payment program.

Timber Sale Practices and Procedures

Section 14 of NFMA sets forth guidelines for timber sales in the National Forest System.⁴⁵ It requires an appraisal of the timber value in each sale and advertisement of the sale. Each sale is to be at not less than the appraised value, in open and competitive bidding. The timber harvest is to be supervised by a USDA employee. And the Secretary of Agriculture is to develop timber utilization standards, measurement methods, and harvesting practices “to provide for the optimum practical use of the wood material.” Since the bill states that trust projects comply with NFMA (among other laws), it is unclear whether these guidelines would necessarily continue to be implemented and enforced.

Regulations for Implementation

The bill does not require regulations to implement its provisions. However, the USFS would be implementing different timber sale procedures on different lands, depending on decisions by the counties. Thus, regulations for the timber sale procedures for trust projects might be needed to provide consistent practices and to assure that adequate receipts are deposited in the trust. Moreover, counties could move into and out of the trust program from year to year, and the USFS might need regulations to guide timber practices on sales begun as trust projects versus those begun as non-trust projects.

Impacts on USFS Staffing and Funding

H.R. 4019 would likely increase USFS staffing needs and funding requirements. Additional staff would likely be needed to prepare and administer the expected increase in timber sales, although some staff might be saved by decreasing the needed environmental analysis on those sales. However, implementing different sets of sale regulations on possibly adjoining lands could significantly increase the total work effort. In addition, it seems likely that some additional staff will be needed to administer the trust and trust payments.

Additional funding would likely be needed. As noted above, one possible avenue for achieving the revenue requirements is to reduce or eliminate USFS deposits to many of the MSAs. Thus, additional funding would likely be needed to replace funds for:

- timber sale preparation and administration from the Salvage Sale Fund and possibly the Timber Sale Pipeline Fund;

⁴⁵ 16 U.S.C. § 472a.

- reforestation from the K-V Fund and brush disposal funds;
- fuel treatment to replace brush disposal funds and to replace forest health improvements achieved through stewardship contracts; and
- mitigation of the effects of the additional timber sales on other resource values and conditions, such as degradation to water quality and loss of certain types of animal habitats, from the K-V fund.

In addition, funding for staff to administer the trust and trust payments would likely be needed, since trust funds are not authorized to be used for administration of the trust.

The extent of possible additional funding needs is unclear, but seems likely to be at least as much as the decline in deposits to USFS MSAs—\$142 million annually for FY2008-FY2010 for the four timber-related accounts and another \$124 million annually for FY2008-FY2010 for the other MSAs. In the current tight federal fiscal situation, it is unclear how such additional funding might be provided.

Author Contact Information

Ross W. Gorte
Specialist in Natural Resources Policy
rgorte@crs.loc.gov, 7-7266

Kristina Alexander
Legislative Attorney
kalexander@crs.loc.gov, 7-8597

M. Lynne Corn
Specialist in Natural Resources Policy
lcorn@crs.loc.gov, 7-7267