

Congress and Public Lands

Key Structural Features of Congress

- Localism and pork-barrel
- Electoral cycles and short-time horizons
- Partisanship and divided government
- Decentralized committees and fragmentation

Key Committees for Public Lands

- House Committee on Resources (<http://www.house.gov/resources/>)
- U.S. Rep. Nick J. Rahall (D-WV); LCV = 92 (Don Young, R, AK= 10; LCV “Dirty Dozen); American Land Rights Association= 22
- Senate Committee on Energy and Natural Resources (<http://www.senate.gov/~energy/>)
- New chairman; Jeff Bingaman (D-NM); LCV=100 (Domenici=14); ALRA= 36
- Appropriations Committees

The League of Private Property Voters
Recognizes
Representative
Wally Herger

as a

Champion
of Private Property Rights

In recognition of achieving 100% on the 2007
Private Property Congressional Vote Index



Charles S. Cushman, Chairman



The League of Private Property Voters
declares

SENATOR

LIBERAL LAMAR ALEXANDER

as an

ENEMY

OF PRIVATE PROPERTY RIGHTS

FOR ATTACKING PROPERTY RIGHTS
ON THE 2007 PRIVATE PROPERTY
CONGRESSIONAL VOTE INDEX



Chuck Cushman, Chairman

Mechanisms of Congressional Influence

- Legislation (e.g., county payments program in bail-out bill)
- Statutory reporting requirements
- GAO reports (e.g.; analysis of funding shortfalls on National Wildlife Refuges)
- Letters/informal contact to agency officials
- Hearings and testimony (hearing on oil/gas)
- Appropriations process

Congress Power Example: Salvage Rider in 104th Congress

- Passed as amendment to Emergency Supplemental Appropriations and Rescissions Act (Written by Mark Rey, now Dept. of Ag., Undersecretary for Natural Resource and Environment)
- Streamlined “salvage sales” by exempting them from certain procedural requirements, and also prohibiting administrative appeals
- Released pending old growth sales that were held up because of Spotted Owl and Marbled Murrelet
- Salvage sales are supposed to be directed towards dead or dying wood, from disease, fire, insects
- Subsequent battle of Congressional oversight of Forest Service implementation; Forest Service tried to slow salvage sales
- Environmentalists report severe abuses, e.g., violating habitat requirements for endangered species; sales with too much green wood
- Expired in 1996; but many think Bush administration’s “Healthy Forests” initiative merely rehashes salvage rider

The President and Public Lands

Generic Presidential Powers

- Agenda-setting
- Veto
- Appointment (Dick Kempthorne of Idaho, Secretary of Interior, originally Gale Norton)
- Removal power (e.g. reductions in force)
- Budgetary authority
- Reorganization power (e.g., Reagan abolishing EPA enforcement office)
- Executive orders (e.g., Nixon's EO 11644, for zoning ORV areas; Clinton's EO 13007, protect Native American sacred sites)
- Centralized regulatory review (cost-benefit analysis)
- Policy coordination (Council of the Environment etc)



The Julie MacDonald Incident

- Julie MacDonald appointed in 2004 to Deputy Assistant Secretary of Fish, Wildlife and Parks; oversight of ESA (Source: Department of Interior Inspector General Report, 2007)
- MacDonald resigns in 2007

When we interviewed the former Director of the FWS Endangered Species Program (ES), he stated that many of the scientific reports his office has issued have been edited extensively by MacDonald, who has no background in biology, and cited the Sage Grouse Risk Analysis as an example. He explained that many other officials in MacDonald's position have made changes to reports to reflect their political philosophy, but MacDonald took it a step further by involving herself at the field level. He explained that MacDonald regularly bypassed managers to speak directly with field staff, often intimidating and bullying them into producing documents that had the desired effect she and the former Assistant Secretary wanted.

The former ES Director discussed one instance in which MacDonald interfered in FWS critical habitat fieldwork. He said that in central California, FWS had been collecting data where *vernal pools* were located to designate them as a critical habitat. He said FWS was conducting the work under a court order with a required date of completion. He explained that several days before this date, FWS sent its report to MacDonald, who then determined that the economic cost of designating the area as a critical habitat was unacceptable. The former ES Director said MacDonald ordered him to revise the report to reflect her position.

Executive Leadership in Public Lands

- Forest Reserve Amendment of 1891
- Mineral withdrawals
- Antiquities Act of 1906: Grand Staircase-Escalante, 1996 Clinton
- National monument designations have often preceded national park legislation
- In the past, Republicans also designated public lands (e.g., Teddy Roosevelt; more partisan now)

Presidential Power Example: Roadless Area Conservation

Clinton

- 1999, Clinton directs Secretary of Agriculture to protect inventoried roadless areas (DEIS generates 1.15 million comments; 60k original letters; 95% support)
- (1/2001) Roadless Area Conservation Rule prohibits road building and timber harvesting in R.A. (58.5 million acres); replaces forest-level planning with nat. standards

G.W. Bush

- (early 2001) Bush Chief of Staff postpones implementation of RACR for 60 days
- (4/2001) Idaho sued for violation of NEPA; District court enjoined implementation, and Bush admin did not appeal
- In meantime, Bush admin revises and issues interim rules for RA management that leave more discretion for management to Regional Foresters
- (12/2002) Ninth Circuit intervenes on behalf of enviros and reverses injunction; Clinton roadless rule in effect
- (4/2005): Bush administration promulgates new Roadless rule requiring state petition for protection; Tongass exempted
- (10/2005) Enviro groups and Western states sue Bush roadless rule; NEPA/ESA analysis were not conducted
- (9/20/2006) Federal district court throws out Bush roadless rules for violations of NEPA/ESA—Clinton rule reinstated.
- (2007) Bush administration invites state-specific rulemaking petitions under Administrative Procedures Act

Opening 2008 Presidential Platform Statements

“Barack Obama and Joe Biden believe that we have a responsibility to our children to leave this Earth better than we found it. All Americans have an interest in the protection and proper maintenance of our irreplaceable national treasures. Conservation is also vitally important to providing clean drinking water, cleaning our air and reducing greenhouse gas pollution. Barack Obama and Joe Biden believe we need a new vision for conservation that both protects our existing publicly-owned lands while dramatically expanding investments in protecting and restoring forests, grasslands, and wetlands across America for generations to come.”



“John McCain is proud of his longstanding commitment to conserving America's natural resources and promoting environmental stewardship. John McCain knows we face immense environmental challenges that will impact the quality of life we leave our children and future generations. A McCain White House will reflect the guiding principles of Theodore Roosevelt, America's foremost conservation president.”



When people are hurting, and struggling to afford gasoline, food, and other necessities, common sense requires that we draw upon America's own vast reserves of oil and natural gas.	R (mc)	R	D
We should promote responsible growth and encourage state and local officials to implement open space initiatives and establish green corridors within our communities.	R (mc)	R	D
Will require oil companies to develop the 68 million acres of land (over 40 million of which are offshore) which they have already leased and are not drilling on.	D	R	D
Cap-and-trade policy will require all pollution credits to be auctioned, and proceeds will go to investments in a clean energy future, habitat protections, and rebates and other transition relief for families.	D	R	D
Proposes A Cap-And-Trade System That Would Set Limits On Greenhouse Gas Emissions While Encouraging The Development Of Low-Cost Compliance Options	R (mc)	R	D
Re-evaluate the transportation funding process to ensure that smart growth considerations are taken into account and he will also re-commit federal resources to public mass transportation projects across the country	D	R	D
Promote collaborative public-private partnership initiatives such as the North America Waterfowl Management Plan, which build upon the common objectives of various stakeholder groups including hunters and conservation advocates.	R (mc)	R	D
Will lead efforts to acquire and conserve new parks and public lands, focusing on ecosystems such as the Great Plains and Eastern forests which do not yet have the protection they deserve.	D	R	D
From the Grand Canyon to Gettysburg, to the Indiana Dunes and the Everglades, we must preserve the cultural significance and natural beauty of our most wild and historic places.	R (mc)	R	D
Increase funding for the Conservation Security Program and the Conservation Reserve Program and will create additional incentives for private landowners to protect and restore wetlands, grasslands, forests, and other wildlife habitat.	D	R	D

Answers

Courts and Public Lands

Judicial Review of Agency Decisions

- Overarching framework: Administrative Procedures Act of 1946
- Section 706 (2)(A): Courts must set aside agency actions found to be “arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with the law”
- Chevron vs NRDC 1976 test:
 1. If court finds an unambiguously expressed Congressional intent; intent rules
 2. If intent is vague, then Court can only determine if agency is using reasonable interpretation
- Opens door to agency discretion
- Procedural hurdles to APA suits: e.g; standing, exhaustion of remedies
- The *substantive standards* used to evaluate “reasonableness” are set by the controlling statute (e.g, NFMA, FLPMA)

National Environmental Policy Act of 1969

Basic Provisions

- Targets major federal actions that could significantly affect quality of environment
- Goal of NEPA: “Encourage productive and enjoyable harmony between humans and the environment; to promote efforts which will prevent or eliminate damage to the environment...”
- Action-forcing mechanism: Environmental Impact Statement
 1. Environmental impact
 2. Unavoidable adverse impacts and mitigation
 3. Mitigation of unavoidable
 4. Alternatives
- Two key questions: Must the agency prepare a full EIS (EA, FONSI)? Is the EIS adequate?
- NEPA does not mandate particular results, only procedural requirements: “NEPA merely prohibits uninformed—rather than unwise—agency action”
- NEPA also establishes Council of Environmental Quality to write NEP regs and oversee implementation

Patterns and Consequences of Litigation

Increasing Litigation Since 1970

- Early 70s; courts were active in policy; less so now
- Detailed land management legislation gives meat to lawyers
- Emergence of broad public interest groups
- Probably peaked in late 70s, early 80s; resurgence now with many radical groups

Consequences

- Environmental factors are at least considered, if not acted upon
- Diversified agency personnel; brought in biological norms
- Increased representation of environmental interests in agency decision-making
- Makes agency decision-making more transparent to public
- Redistribute agency resources towards court mandates
- Reduce discretion of administrators
- Increase power of legal staff

Litigation patterns 1970-2002

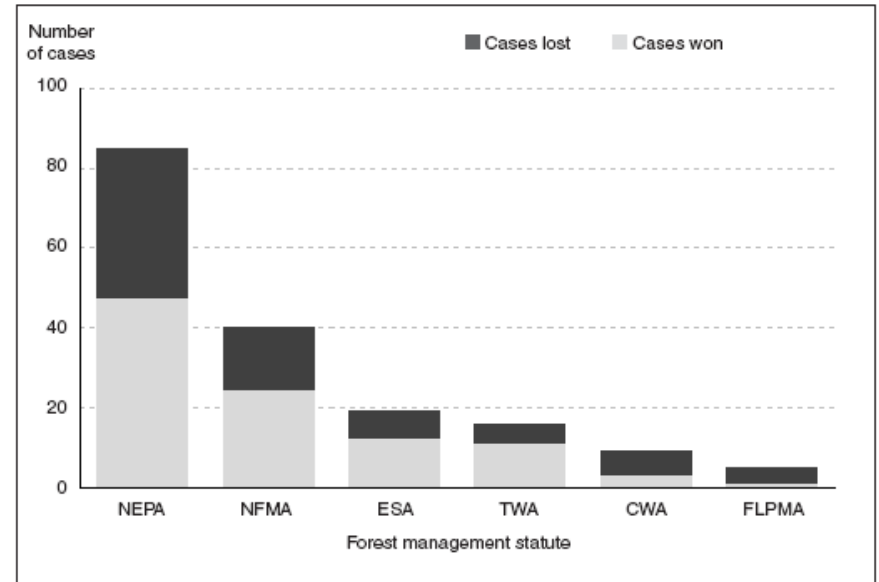
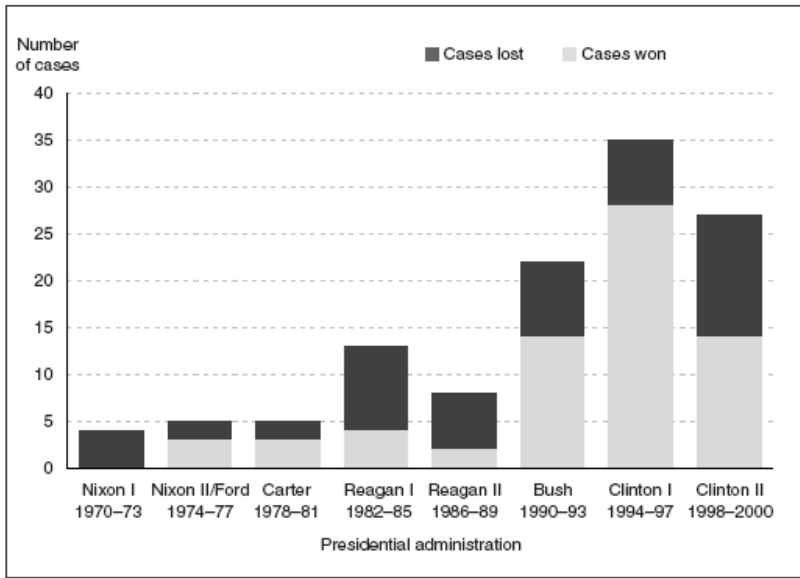
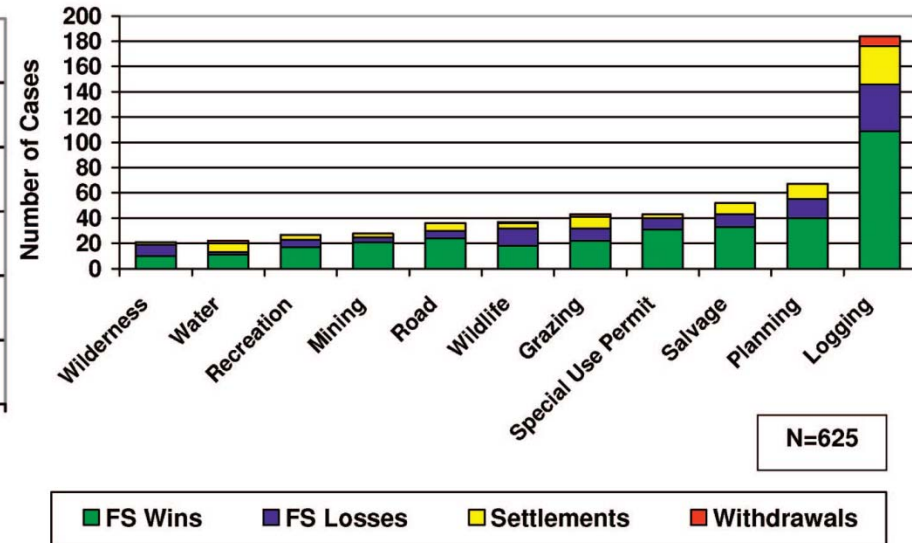
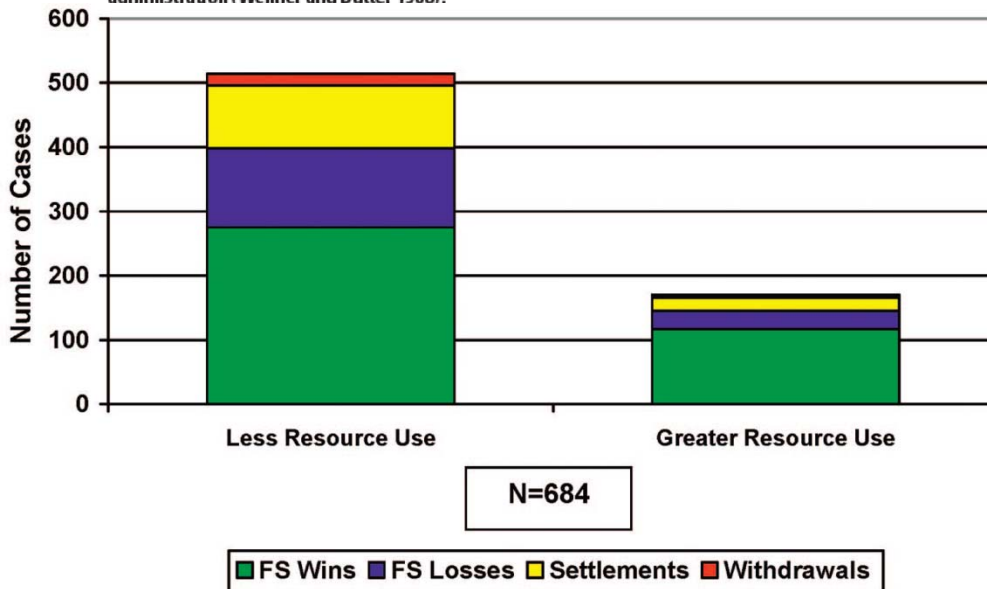
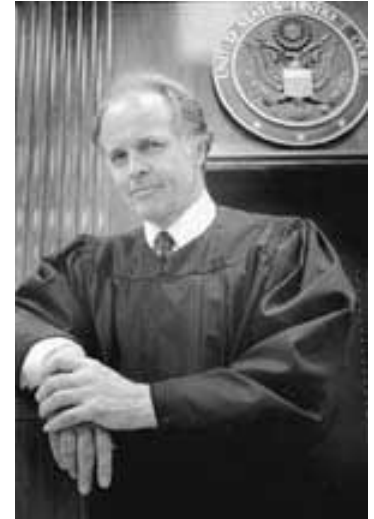


Figure 1. Number of Forest Service US courts of appeals cases and number of cases won by the Forest Service, by presidential administration. *Note:* The courts' decisions are assigned to presidential administrations, with a one-year lag to allow for cases initiated in the previous administration (Wenner and Dutter 1988).



Attitudinal Model of Judicial Decision-Making

- The “contextual” model of judicial decision-making posits that judges make decisions based on constitutional principles, case law, and legislative intent
- These rules are often not precise; leave a “zone of discretion”
- The ideology and attitudes of judges play a large role in their decisions (e.g. partisanship and Chevron cases)
- Two main consequences: “venue shopping”; politics of appointment
- Example: Judge William Dwyer (died 2002) Senior U.S. District Court judge in Washington; ruling on Northern spotted owl set the stage for the Northwest Forest Plan; also made subsequent rulings enjoining timber sales in the that were not consistent with NW plan



A JUDGE'S JUDGE: The late Judge William L. Dwyer (photo courtesy Bar News)

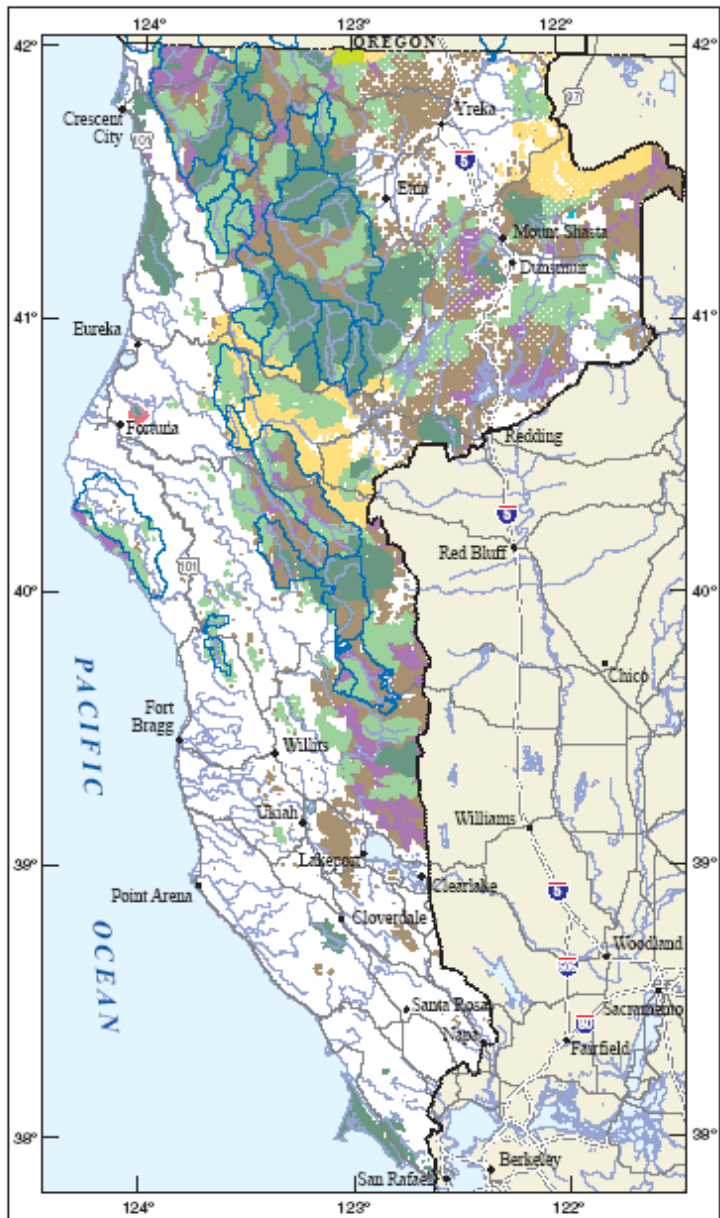
Judge Dwyer on the Spotted Owl (1991)

The problem here has not been any shortcoming in the laws, but simply a refusal of administrative agencies to comply with them. This invokes a public interest of the highest order: the interest in having government officials act in accordance with the law...This is not the usual situation in which the court reviews and administrative decision and, in doing so, gives deference to agency expertise. The Forest Service here has not take the necessary steps to make a decision in the first place—yet it seeks action with major environmental impact...Had the Forest Service done what Congress directed it to do last fall—this case would have ended some time ago.

More is involved here than a simple failure of an agency to comply with its governing statute. The most recent violation of NFMA exemplifies a deliberate and systematic refusal by the Forest Service and the FWS to comply with the laws protecting wildlife. This is not the doing of the scientists, foresters, rangers, and others at the working levels of these agencies. It reflects decisions made by higher authorities in the executive branch of government.

Northwest Forest Plan Land Allocations

Northwest Forest Plan - 2002



LEGEND

Land Allocations
 Land allocations on this map depict major mapped features of the NWFP and reflect the land allocation hierarchy in the NWFP Record of Decision. Riparian Reserves overlap other land allocations and are not displayed separately.

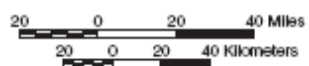
- Congressionally Reserved Area
- Late-Successional Reserve (LSR)
(Not shown: LSRs associated with some species sites)
- Adaptive Management Reserve
(Category depicts LSRs within Adaptive Management Areas)
- Adaptive Management Area
- Managed Late-Successional Area
- Administratively Withdrawn Area
(Only major categories are shown)
- Other Area
(Category depicts a mix of Matrix, Riparian Reserves, and other unmapped land allocations)
- No NWFP Designation

- Boundaries**
- Key Watershed
 - Northwest Forest Plan Boundary



LOCATION MAP

U.S. DEPARTMENT OF THE INTERIOR
 Bureau of Land Management
 U.S. DEPARTMENT OF THE AGRICULTURE
 Forest Service
 2004



No warranty is made by the Bureau of Land Management as to the accuracy, reliability, or completeness of these data for individual or aggregate use with other data. Original data were compiled from various sources. This information may not meet National Map Accuracy Standards. This product was developed through digital means and may be updated without notification.

Judicial Role in NW Forest Plan

- NW Forest Plan adopted in 1994 to protect old growth species (esp. Northern Spotted Owl) in Pacific NW;
- Clinton leadership, collaborative policy, ecosystem management
- NW Forest Plan officially amends forest plans in region (19 nat. forests plus BLM and other lands)
- “Survey and manage”: Population surveys must be conducted for any ground-disturbing activities initiated 1999
- USFS tries to conduct timber sales without required population surveys, citing their expertise as reason to defer to their interpretation of NW Plan; environmentalists sue in 1999
- Court determines FS is acting in an arbitrary manner, contrary to plain language in Plan
- Enjoins 9 timber sales, leading FS to hold up all current sales; settlement agreement eventually reached
- Bush administration currently trying to eliminate “Survey and Manage” provisions because timber sales not going as fast as predicted

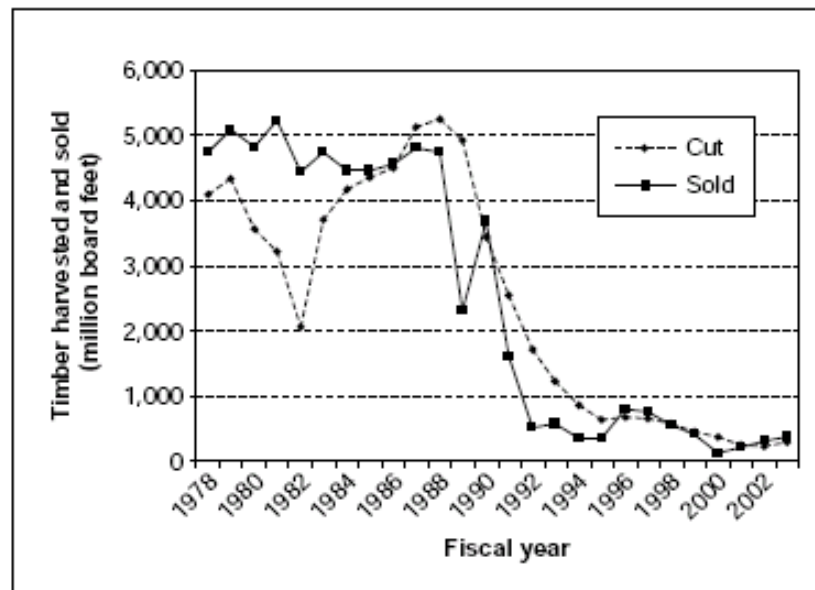


Figure 2—Timber harvested and sold on Plan area national forests, fiscal year 1978–2002 (long log). Source: Forest Service cut and sold reports.

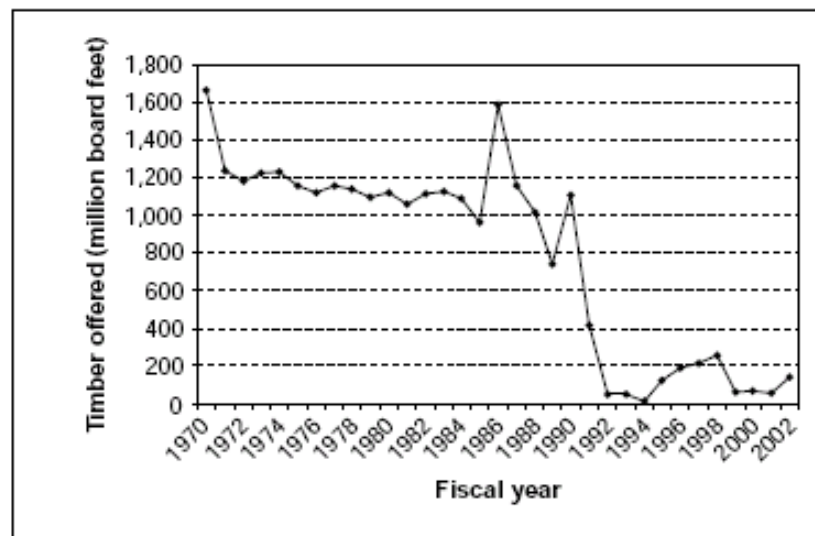


Figure 3—Timber offered for sale on western Oregon Bureau of Land Management (BLM) districts, fiscal years 1970–2002 (short log). Includes Klamath Falls portion of the Lakeview District. Source: BLM Facts (1970–97), Timber sale information system reports (1998–2002).