

## Calendar No. 720

115TH CONGRESS }  
2d Session } SENATE { REPORT  
115-429

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### PROTECT COLLABORATION FOR HEALTHIER FORESTS ACT

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DECEMBER 11, 2018.—Ordered to be printed

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Ms. MURKOWSKI, from the Committee on Energy and Natural Resources, submitted the following

#### R E P O R T

together with

#### MINORITY VIEWS

[To accompany S. 2160]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 2160) to establish a pilot program under which the Chief of the Forest Service may use alternative dispute resolution in lieu of judicial review for certain projects, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

#### SECTION 1. SHORT TITLE.

This Act may be cited as the “Protect Collaboration for Healthier Forests Act”.

#### SEC. 2. ALTERNATIVE DISPUTE RESOLUTION PILOT PROGRAM.

(a) DEFINITIONS.—In this Act:

(1) ARBITRATOR.—The term “arbitrator” means a person—  
(A) selected by the Secretary under subsection (d)(1); and  
(B) that meets the qualifications under subsection (d)(2).

(2) LAND AND RESOURCE MANAGEMENT PLAN.—The term “land and resource management plan” means a plan developed under section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604).

(3) PARTICIPANT.—The term “participant” means an individual or entity that, with respect to a project—

- (A) has exhausted the administrative review process under part 218 of title 36, Code of Federal Regulations (or successor regulations); or
- (B) in the case of a project that is categorically excluded for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), has participated in a collaborative process under clause (i) or (ii) of subsection (c)(1)(A).
- (4) PILOT PROGRAM.—The term “pilot program” means the pilot program implemented under subsection (b)(1).
- (5) PROJECT.—The term “project” means a project described in subsection (c).
- (6) SECRETARY.—The term “Secretary” means the Secretary of Agriculture, acting through the Chief of the Forest Service.
- (b) ARBITRATION PILOT PROGRAM.—
  - (1) IN GENERAL.—Not later than 2 years after the date of enactment of this Act, the Secretary shall issue a final rule to implement an arbitration pilot program, to be carried out in the States of Idaho, Montana, and Wyoming, as an alternative dispute resolution in lieu of judicial review for projects described in subsection (c).
  - (2) LIMITATION ON NUMBER OF PROJECTS.—
    - (A) IN GENERAL.—The Secretary may not designate for arbitration under the pilot program more than 2 projects per calendar year.
    - (B) EXCEPTION.—If the Secretary designates a project for arbitration under the pilot program, and no participant initiates arbitration under subsection (e)(2), that project shall not count against the limitation on the number of projects under subparagraph (A).
  - (3) APPLICABLE PROCESS.—Except as otherwise provided in this Act, the pilot program shall be carried out in accordance with subchapter IV of chapter 5 of title 5, United States Code.
  - (4) EXCLUSIVE MEANS OF REVIEW.—The alternative dispute resolution process under the pilot program for a project designated for arbitration under the pilot program shall be the exclusive means of review for the project.
  - (5) NO JUDICIAL REVIEW.—A project that the Secretary has designated for arbitration under the pilot program shall not be subject to judicial review.
- (c) DESCRIPTION OF PROJECTS.—
  - (1) IN GENERAL.—The Secretary, at the sole discretion of the Secretary, may designate for arbitration projects that—
    - (A)(i) are developed through a collaborative process (within the meaning of section 603(b)(1)(C) of the Healthy Forest Restoration Act of 2003 (16 U.S.C. 6591b(b)(1)(C));
    - (ii) are carried out under the Collaborative Forest Landscape Restoration Program established under section 4003 of the Omnibus Public Land Management Act of 2009 (16 U.S.C. 7303); or
    - (iii) are identified in a community wildfire protection plan (as defined in section 101 of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6511));
  - (B) have as a purpose—
    - (i) reducing hazardous fuels; or
    - (ii) reducing the risk of, or mitigating, insect or disease infestation;
 and
  - (C) are located, in whole or in part, in a wildland-urban interface (as defined in section 101 of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6511)).
- (2) INCLUSION.—In designating projects for arbitration, the Secretary may include projects that are categorically excluded for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).
- (d) ARBITRATORS.—
  - (1) IN GENERAL.—The Secretary shall develop and publish a list of not fewer than 15 individuals eligible to serve as arbitrators for the pilot program.
  - (2) QUALIFICATIONS.—To be eligible to serve as an arbitrator under this subsection, an individual shall be—
    - (A) recognized by—
      - (i) the American Arbitration Association; or
      - (ii) a State arbitration program; or
    - (B) a fully retired Federal or State judge.
- (e) Initiation of Arbitration.—
  - (1) IN GENERAL.—Not later than 7 days after the date on which the Secretary issues the applicable decision notice or decision memo with respect to a project, the Secretary shall—

- (A) notify each applicable participant and the Clerk of the United States District Court for the district in which the project is located that the project has been designated for arbitration under the pilot program; and
  - (B) include in the applicable decision notice or decision memo a statement that the project has been designated for arbitration.
- (2) INITIATION.—
  - (A) In general.—A participant that has received a notification under paragraph (1) and is seeking to initiate arbitration for the applicable project under the pilot program shall file a request for arbitration with the Secretary not later than 30 days after the date of receipt of the notification.
  - (B) REQUIREMENT.—The request under subparagraph (A) shall include an alternative proposal for the applicable project that—
    - (i) describes each modification sought by the participant with respect to the project; and
    - (ii) is consistent with the goals and objectives of the applicable land and resource management plan, all applicable laws, regulations, legal precedent and policy directives, and the purpose and need for the project.
  - (C) FAILURE TO MEET REQUIREMENTS.—A participant who fails to meet the requirements of subparagraphs (A) and (B) shall be considered to have forfeited their standing to initiate arbitration under this paragraph.
- (3) COMPELLED ARBITRATION.
  - (A) IN GENERAL.—For any request for judicial review with respect to a project that the Secretary has designated for arbitration under the pilot program—
    - (i) the Secretary shall file in the applicable court a motion to compel arbitration in accordance with this Act; and
    - (ii) the applicable court shall compel arbitration in accordance with this Act.
  - (B) FEES AND COSTS.—For any motion described in subparagraph (A) for which the Secretary is the prevailing party, the applicable court shall award to the Secretary—
    - (i) full or partial court costs; and
    - (ii) full or partial attorney's fees.
- (f) SELECTION OF ARBITRATOR.—For each arbitration initiated under this Act—
  - (1) each applicable participant shall propose 2 arbitrators; and
  - (2) the Secretary shall select 1 arbitrator from the list of arbitrators proposed under paragraph (1).
- (g) RESPONSIBILITIES OF ARBITRATOR.
  - (1) IN GENERAL.—An arbitrator—
    - (A) shall address all claims or modifications sought by each party seeking arbitration with respect to a project under this Act; but
    - (B) may consolidate into a single arbitration all requests to initiate arbitration by all participants with respect to a project.
  - (2) CONSIDERATION OF PROPOSED PROJECTS AND DECISION.—For each project for which arbitration has been initiated under this Act, the arbitrator shall make a decision with respect to the project by (A) selecting the project, as approved by the Secretary;
    - (B) selecting the alternative proposal submitted by the applicable participant in the request for initiation of arbitration for the project filed under subsection (e)(2)(A); or
    - (C) rejecting both options described in subparagraphs (A) and (B).
  - (3) CONVENE HEARINGS.—In carrying out paragraph (2), the arbitrator may convene the Secretary and the participant, including by telephone conference or other electronic means to consider—
    - (A) the administrative record;
    - (B) arguments and evidence submitted by the Secretary and the participant;
    - (C) the project, as approved by the Secretary; and
    - (D) the alternative proposal submitted by the applicable participant in the request for initiation of arbitration for the project filed under subsection (e)(2)(A).
  - (4) LIMITATIONS.—An arbitrator may not modify any project or alternative proposal contained in a request for initiation of arbitration of a participant under this Act.
- (h) INTERVENTION.—A party may intervene in an arbitration under this Act if, with respect to the project to which the arbitration relates, the party—
  - (1) meets the requirements of Rule 24(a) of the Federal Rules of Civil Procedure (or a successor rule); or

(2) participated in the applicable collaborative process referred to in clause (i) or (ii) of subsection (c)(1)(A).

(i) SCOPE OF REVIEW.—In carrying out arbitration for a project, the arbitrator shall set aside the agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, within the meaning of section 706(2)(A) of title 5, United States Code.

(j) DEADLINE FOR COMPLETION OF ARBITRATION.—Not later than 90 days after the date on which arbitration is initiated for a project under the pilot program, the arbitrator shall make a decision with respect to all claims or modifications sought by the participant that initiated the arbitration.

(k) EFFECT OF ARBITRATION DECISION.—A decision of an arbitrator under this Act—

(1) shall not be considered to be a major Federal action;

(2) shall be binding; and

(3) shall not be subject to judicial review, except as provided in section 10(a) of title 9, United States Code.

(l) ADMINISTRATIVE COSTS.

(1) IN GENERAL.—The Secretary shall—

(A) be solely responsible for the professional fees of arbitrators participating in the pilot program; and

(B) use funds made available to the Secretary and not otherwise obligated to carry out subparagraph (A).

(2) TRAVEL COSTS.—The Secretary—

(A) shall be solely responsible for reasonable travel costs associated with the participation of an arbitrator in any meeting conducted under subsection (g)(3); and

(B) shall not be responsible for the travel costs of a participant under subsection (g)(3).

(3) ATTORNEY'S FEES.—No arbitrator may award attorney's fees in any arbitration brought under this Act.

(m) REPORTS.—

(1) IN GENERAL.—Not later than 2 years after the date on which the Secretary issues a final rule to implement the pilot program under subsection (b)(1), the Secretary shall submit to the Committee on Agriculture, Nutrition, and Forestry and the Committee on Energy and Natural Resources of the Senate and the Committee on Natural Resources of the House of Representatives, and publish on the website of the Forest Service, a report describing the implementation of the pilot program, including—

(A) the reasons for selecting certain projects for arbitration;

(B) an evaluation of the arbitration process, including any recommendations for improvements to the process;

(C) a description of the outcome of each arbitration; and

(D) a summary of the impacts of each outcome described in subparagraph (C) on the timeline for implementation and completion of the applicable project.

(2) GAO REVIEWS AND REPORTS.—

(A) REVIEW ON TERMINATION.—On termination of the pilot program under subsection (n), the Comptroller General of the United States shall review the implementation by the Secretary of the pilot program, including—

(i) the reasons for selecting certain projects for arbitration under the pilot program;

(ii) the location and types of projects that were arbitrated under the pilot program;

(iii) a description of the outcomes of the projects that were arbitrated under the pilot program;

(iv) a description of the participants who initiated arbitration under the pilot program;

(v) a description and survey of the arbitrators who participated in the pilot program;

(vi) the type and outcome of any requests for judicial review with respect to a project that the Secretary designated for arbitration under the pilot program; and

(vii) any other items the Comptroller General of the United States may find applicable for evaluating the pilot program.

(B) REPORT.—After completion of the review described in subparagraph

(A) and not later than 1 year after termination of the pilot program under subsection (n), the Comptroller General of the United States shall submit to the Committee on Agriculture, Nutrition, and Forestry and the Committee on Energy and Natural Resources of the Senate and the Committee

on Natural Resources of the House of Representatives a report, describing the results of the applicable review.

(n) TERMINATION.—The Secretary may not designate a project for arbitration under the pilot program on or after the date that is 5 years after the date on which the Secretary issues a final rule to implement the pilot program under subsection (b)(1).

(o) EFFECT.—Nothing in this Act affects the responsibility of the Secretary to comply with—

- (1) the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.);
- (2) the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.);

or

- (3) other applicable laws.

#### PURPOSE

The purpose of S. 2160 is to establish a pilot program under which the Chief of the Forest Service may use alternative dispute resolution in lieu of judicial review for certain projects.

#### BACKGROUND AND NEED

At least 58 million acres of national forest are at high or very high risk of severe wildfire. Vegetation management activities can reduce this wildlife risk and help restore forest resilience. However, it typically takes 18 months to four years for the U.S. Forest Service to develop and implement a vegetation management project. As a result, only a small fraction of the identified high risk wildfire areas are treated each year.

Stakeholder conflicts over such projects often result in litigation in Federal Court. The Forest Service has faced a rising number of lawsuits over the last 20 years, a majority of which involve vegetation management issues (See Amanda M.A. Miner, Robert W. Malmesheimer, and Denise M. Keele, Twenty Years of Forest Service Land Management Litigation, *Journal of Forestry* (Jan. 2014)). Region One of the Forest Service, which covers Montana, parts of Idaho, and North Dakota, has one of the highest litigation levels in the agency from 2008 through 2013, more than 70 projects were subject to litigation, encumbering 40 to 50 percent of the Region's planned timber harvest volume and treatment acres. (See Todd A. Morgan and John Baldridge, Understanding Costs and Other Impacts of Litigation of Forest Service Projects: A Regional One Case Study (May 5, 2015)).

S. 2160 establishes a five-year pilot program in the States of Montana, Idaho, and Wyoming for the use of binding arbitration as an alternative dispute resolution process for certain collaborative vegetation management projects. The bill's goal is to avoid time-consuming and costly litigation and resolve issues so needed for forestry work can move forward. The pilot program authority sunsets after five years.

#### LEGISLATIVE HISTORY

S. 2160 was introduced by Senator Daines on November 16, 2017. The Subcommittee on Public Lands, Forests, and Mining held a hearing to consider the bill on August 22, 2018.

The Senate Committee on Energy and Natural Resources met in open business session on October 2, 2018, and ordered S. 2160 favorably reported, as amended.

## COMMITTEE RECOMMENDATION AND TABULATION OF VOTES

The Senate Committee on Energy and Natural Resources, in open business session on October 2, 2018, by a majority vote of a quorum present, recommends that the Senate pass S. 2160, if amended as described herein.

The roll call vote on reporting the measure was 13 yeas, 10 nays, as follows:

YEAS	NAYS
Ms. Murkowski	Ms. Cantwell
Mr. Barrasso	Mr. Wyden *
Mr. Risch	Mr. Sanders *
Mr. Lee	Ms. Stabenow
Mr. Flake *	Mr. Heinrich
Mr. Daines	Ms. Hirono
Mr. Gardner	Mr. King
Mr. Alexander	Ms. Duckworth
Mr. Hoeven	Ms. Cortez Masto
Mr. Cassidy	Ms. Smith
Mr. Portman	
Ms. Capito	
Mr. Manchin	

\* Indicates vote by proxy.

## COMMITTEE AMENDMENT

During its consideration of S. 2160, the Committee adopted an amendment in the nature of a substitute (ANS).

The ANS amends subsection (a) to define the terms “arbitrator” and “land and resource management plan;” and modify the definition of the term “participant” to make clear that a participant is an individual or entity that has exhausted the administrative review process or has participated in a collaborative process, if their project has been categorically excluded under the National Environmental Policy Act (NEPA, 42 U.S.C. 4321 et seq.).

The ANS amends subsection (b) to provide the Secretary with two years to implement the pilot program, rather than 180 days; authorize the Secretary to choose projects in Idaho, Montana, or Wyoming, not just in Region 1; and make clear that the alternative dispute resolution is the exclusive means of project review.

The ANS consolidates subsection (d), relating to the cap on eligible projects for the pilot program, into subsection (b) of the ANS, and redesignates the applicable subsections accordingly.

In subsection (e), as redesignated, the ANS expands upon the requirements of the alternative proposal by making clear that a sought modification must be clearly explained, and an alternative proposal must be consistent with the project’s purpose and the applicable land and resource management plan’s goals and objectives. The substitute amendment also makes clear that failure to meet the requirements forfeit a participant’s standing to initiate arbitration and requires a court to award only partial court costs and attorney fees if the Secretary prevails on judicial review.

In subsection (f), as redesignated, the ANS requires the project participant to propose two arbitrators from the designated list and directs the Secretary to choose one of the proposed arbitrators,

rather than allowing the Secretary to choose three arbitrators and having the participant choose one.

In subsection (g), as redesignated, the substitute amendment authorizes the arbitrator to convene hearings, and strikes the original subsection (h)(3)(A), which limited the evidence that an arbitrator could consider to only the administrative record.

In subsection (j), as redesignated, the substitute amendments requires the arbitrator to make a decision 90 days after arbitration is initiated, rather than 90 days after arbitration is requested.

In subsection (l), as redesignated, the ANS requires the Secretary to fund any travel expenses for an arbitrator, but not for a participant.

In subsection (m), as redesignated, the substitute amendment extends the time that the Secretary has to submit reports to the Committees of jurisdiction from one to two years; removes the limitation on the report's length; requires the Government Accountability Office (GAO) to conduct a review of the program once the pilot program is terminated, rather than two years after it is established; provides criteria for the GAO to consider in its review; and modifies the sunset to prohibit the Secretary from designating a project for the pilot program five years after the final rule is published, rather than completely terminating the program.

#### SECTION-BY-SECTION ANALYSIS

*Sec. 1. Short title*

Section 1 provides a short title.

*Sec. 2. Alternative dispute resolution pilot program*

Subsection (a) defines key terms.

Subsection (b) directs the Secretary of Agriculture (Secretary), within two years of the Act's enactment, to issues a final rule to implement an arbitration pilot program, to be used as an alternative dispute resolution instead of judicial review, for Idaho, Montana, and Wyoming. This subsection also allows for only two projects to be designated for the program per year and requires the pilot project to be carried out in accordance with 5 U.S.C. 571 et seq. This subsection further provides that the pilot program's alternative dispute resolution process is the exclusive means of project review and makes clear that projects designated for the pilot program are not subject to judicial review.

Subsection (c) provides criteria for a project to be designated for arbitration under the pilot program, including projects developed through a collaborative process; carried out under the Collaborative Forest Landscape Restoration Program; identified in a community wildfire protection plan; designed to reduce hazardous fuels or mitigate insect or disease infestation; and located within a wildland-urban interface. This subsection also authorizes the Secretary to include projects that have been categorically excluded under NEPA.

Subsection (d) requires the Secretary to develop and publish a list of at least 15 qualified individuals to serve as arbitrators for the pilot program.

Subsection (e) directs the Secretary to provide notification to each applicable participant and the clerk of the appropriate United States District Court, within seven days, of a project's designation

for the pilot program. This subsection also directs participants to file a request to initiate arbitration, including an alternative proposal for the project, within 30 days of receiving the Secretary's notification. The alternative proposal must describe each modification sought and that the proposal is consistent with the project's purpose and the applicable land and resource management plan's goals and objectives. If a participant fails to the requirements, the opportunity to participate in the pilot program will be forfeited. The subsection further makes clear that if judicial review is sought for a project selected for the pilot program, the Secretary shall file a motion to compel arbitration and can be awarded full or partial court costs and full or partial attorney's fees if the Secretary prevails.

Subsection (f) provides for the selection of an arbitrator. The subsection directs each applicable participant to propose two arbitrators and requires the Secretary to select an arbitrator from that list.

Subsection (g) provides the responsibilities of the arbitrator, including addressing all claims and modifications sought, accepting or rejecting the alternative proposal, and convening hearings. The subsection makes clear that the arbitrator cannot modify a project or alternative proposal.

Subsection (h) provides for the intervention in the arbitration by another party under certain conditions.

Subsection (i) directs the arbitrator to set aside an agency action, findings, and conclusions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Subsection (j) requires the arbitrator to make a decision within 90 days of the project's arbitration initiation.

Subsection (k) makes clear that the arbitrator's decision is not a major Federal action, is binding, and is not subject to judicial review.

Subsection (l) requires the Secretary to be responsible for professional fees incurred by the arbitrators and makes clear that the Secretary is not responsible for costs incurred by participants. This subsection also prohibits an arbitrator from awarding attorney's fees.

Subsection (m) requires the Secretary, within two years of initiation of the pilot program, to issue a report to the committees of jurisdiction evaluating the effectiveness of the pilot program. The subsection further requires GAO to evaluate the program and submit a report to the committees of jurisdiction.

Subsection (n) prohibits the Secretary from designating a project for the pilot program five years after the final rule to implement the pilot program is published in the Federal Register.

Subsection (o) makes clear that nothing in this legislation supersedes the authority of the Secretary to comply with the Endangered Species Act (16 U.S.C. 1531 et seq.) or NEPA.

#### COST AND BUDGETARY CONSIDERATIONS

The following estimate of the costs of this measure has been provided by the Congressional Budget Office:

S. 2160 would direct the Forest Service to establish an arbitration pilot program in lieu of judicial review for certain projects located in Idaho, Montana, and Wyoming. The bill would require the Forest Service to issue a rule for the pilot program, develop a list

of eligible arbitrators, pay professional fees to arbitrators, and report to the Congress on the program. S. 2160 also would direct the Government Accountability Office (GAO) to study the results of the pilot program.

According to the Department of Justice, environmental and natural resource cases resolved through alternative dispute resolution—such as arbitration—typically take less time and require fewer resources than cases resolved through litigation. The bill would limit the number of projects subject to arbitration to two projects each year. On that basis, and using information from the Forest Service, CBO estimates that any costs to the Forest Service to implement the pilot program would be offset by savings in federal staff time and litigation expenses, such that the net change in discretionary costs would be negligible. Based on the costs of similar tasks, CBO estimates that the GAO study would cost less than \$500,000; such spending would be subject to the availability of appropriated funds.

Enacting S. 2160 could affect direct spending because, under current law, plaintiffs who challenge the federal government under the Endangered Species Act may be entitled to the repayment of attorneys' fees. Such payments are made from the federal government's Judgment Fund, which has a permanent indefinite appropriation. By prohibiting the award of attorney fees for cases resolved under the pilot program, CBO expects that S. 2160 could reduce the potential for payments from the Judgment Fund. CBO expects that a small number of cases would be resolved under the pilot program; thus, we estimate that any decrease in direct spending would be insignificant over the 2019–2028 period.

Because enacting the bill would affect direct spending, pay-as-you-go procedures apply. The bill would not affect revenues.

CBO estimates that enacting S. 2160 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

The bill would impose an intergovernmental and private-sector mandate as defined in the Unfunded Mandates Reform Act (UMRA) by limiting rights of action for entities seeking judicial review of certain forest projects. Because those rights of action do not generally result in monetary damages and the pilot program is limited to two projects each year, CBO estimates that the cost of the mandates would fall below the intergovernmental and private-sector mandates established in UMRA (\$80 million and \$160 million in 2018, respectively, adjusted annually for inflation).

The CBO staff contacts for this estimate are Janani Shankaran (for federal costs) and Zachary Byrum (for mandates). The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

#### REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out S. 2160. The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of S. 2160, as ordered reported.

#### CONGRESSIONALLY DIRECTED SPENDING

S. 2160, as ordered reported, does not contain any congressionally directed spending items, limited tax benefits, or limited tariff benefits as defined in rule XLIV of the Standing Rules of the Senate.

#### EXECUTIVE COMMUNICATIONS

The testimony provided by the Department of Agriculture at the August 22, 2018, hearing on S. 2160 follows:

STATEMENT OF GLENN CASAMASSA ASSOCIATE DEPUTY  
CHIEF FOR NATIONAL FOREST SYSTEMS, U.S. FOREST  
SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE

Chairman Lee, Ranking Member Wyden, members of the Committee, I am Glenn Casamassa, Associate Deputy Chief for the U.S. Department of Agriculture (USDA) Forest Service. Thank you for the opportunity to speak with you today about the pilot program as described in S. 2160.

Current leadership at agency and department levels are supportive of the idea of arbitration as a tool to help streamline project decisions. This legislation provides a way to test arbitration within a manageable project environment and within specific sideboards.

More specifically, this bill would limit the types of projects to those developed within a specified collaborative process, or Collaborative Forest Landscape Restoration Program (CFLRP), part of a community wildfire protection plan, or have a purpose to reduce hazardous fuels or mitigate insect and disease infestation, and are located in a Wildland Urban Interface.

In keeping within the scope of a pilot, this bill would apply only to the Forest Service's Northern Region and would authorize only two projects per year to be designated for arbitration. This program would be in effect for 5 years.

There are minor technical corrections we would recommend and would be happy to work with the committee staff.

Thank you again for the opportunity to testify on this bill and I look forward to your questions.

## DISSENTING VIEWS OF SENATORS CANTWELL, WYDEN, STABENOW, HEINRICH, HIRONO, AND SMITH

The Administrative Procedure Act affords any “person suffering legal wrong because of agency action” the right to have his or her claim heard in court.<sup>1</sup> S. 2160 creates an exception to that right for persons suffering legal wrong because of certain Forest Service actions in Montana, Idaho, and Wyoming. It allows the Forest Service to shield up to 10 hazardous fuel reduction projects in those states from judicial review. It does this by making arbitration the only way for people to challenge those projects.

We oppose S. 2160, not because we oppose arbitration, but because the bill misuses arbitration to deprive people of their right to judicial review.<sup>2</sup> To understand our concerns, one must first understand the traditional role of arbitration in our legal system and how S. 2160 departs from existing legal principles.

### *Arbitration*

Although not defined in S. 2160, arbitration is commonly understood to mean submitting a dispute to a non-judicial, neutral party for decision rather than trying the case in court.<sup>3</sup> Arbitration has been used to resolve disputes for centuries.<sup>4</sup> Merchants have used it to settle commercial disputes in this country since colonial times.<sup>5</sup>

Merchants found that they could resolve disputes among themselves faster and more cheaply by arbitration than by going to court.<sup>6</sup> Arbitration offered the further advantage of allowing businessmen to submit their disputes to someone of their own choosing, someone who was familiar with the customs and practices of their trade and who would resolve their dispute in keeping with business standards rather than with technical legal rules.<sup>7</sup>

The principal problem with arbitration prior to 1926 was that it was not legally enforceable. If, after agreeing to submit to arbitra-

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<sup>1</sup> 5 U.S.C. § 702.

<sup>2</sup> “[A]rbitration means giving up the right to have a dispute resolved by a judge. . . .” *Smith v. Lindemann*, 710 Fed. Appx. 101, 104 (3d Cir. 2017).

<sup>3</sup> See, e.g., *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 350 (3d Cir. 1997).

<sup>4</sup> P. Kirgis, Judicial Review and the Limits of Arbitral Authority: Lessons from the Law of Contract, 81 St. John’s L. Rev. 99 (2007). See also, F. Emerson, History of Arbitration Practice and Law, 19 Clev. St. L. Rev. 155 (1970) (citing examples in the Bible, Greek mythology, and ancient civilizations); E. Wolaver, The Historical Background of Commercial Arbitration, 83 U. Pa. L. Rev. 132 (1934).

<sup>5</sup> W. Jones, Three Centuries of Commercial Arbitration in New York: A Brief Survey, 1956 Wash. U. L. Rev. 193 (1956); B. Mann, The Formalization of Informal Law: Arbitration Before the American Revolution, 59 N.Y.U. L. Rev. 443 (1984).

<sup>6</sup> Joint Hearings before the House and Senate Judiciary Committees on S. 1005 and H.R. 646, 68th Cong., at 7 (1924) (statement of Charles Bernheimer, N.Y. Chamber of Commerce) (“arbitration saves time, saves trouble, saves money”).

<sup>7</sup> P. Kirgis, Judicial Review and the Limits of Arbitral Authority: Lessons from the Law of Contract, 81 St. John’s L. Rev. 99, 100–101 (2007) (“When [merchants] had disputes, they wanted neutrals grounded in [business] practices to make decisions based on custom and mutual interest. They did not want . . . a . . . judge . . . to mechanically apply fixed legal rules.”).

tion, one of the parties backed out, the courts would not enforce the arbitration agreement.<sup>8</sup>

### *The Federal Arbitration Act*

Congress enacted the Federal Arbitration Act<sup>9</sup> in 1925 to fix that problem. The Arbitration Act simply directs the courts to enforce arbitration agreements like any other contract,<sup>10</sup> and it gives the courts the power to compel compliance with an arbitration agreement if one of the parties tries to back out.<sup>11</sup>

Importantly, the Arbitration Act forces no one to submit to arbitration. The parties must agree to it voluntarily.<sup>12</sup> In the words of the Act's principal draftsman, "No one is required to make an agreement to arbitrate. Such action by a party is entirely voluntary."<sup>13</sup> The Arbitration Act simply says that if the parties have voluntarily agreed to submit to arbitration, the courts will hold them to their agreement.<sup>14</sup>

The focus of the Arbitration Act was on commercial disputes between merchants. By its terms, the Act applies only to commercial and maritime contracts.<sup>15</sup> The legislative history of the Act confirms its limited purpose.<sup>16</sup> The Act was championed by the business community because it was "directed primarily toward settlement of commercial disputes."<sup>17</sup> "The business community's aim was to secure to merchants an expeditious, economical means of resolving their disputes."<sup>18</sup>

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<sup>8</sup>J. Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, 74 Wash. U. L. Q. 637, 644–645 (1996). The courts' refusal to enforce arbitration agreements may be traced to Lord Coke's decision in *Vynior's Case*, 77 Eng. Rep. 597 (K.B. 1609), in which he found an agreement to arbitrate to be revocable. E. Wolaver, *The Historical Background of Commercial Arbitration* 83 U. Pa. L. Rev. 132, 138 (1934).

<sup>9</sup>Act of Feb. 12, 1925, 43 Stat. 883, now codified at 9 U.S.C. § 1 *et seq.*

<sup>10</sup>9 U.S.C. § 2 (declaring arbitration agreements to "be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract"). *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) (stating that the Arbitration Act was designed "to place arbitration agreements 'upon the same footing as other contracts'"') (quoting H. Rept. 68–96 at 1 (1924)).

<sup>11</sup>9 U.S.C. § 3 (directing courts to stay lawsuits on matters subject to an arbitration agreement); 9 U.S.C. § 4 (authorizing courts to issue an order to compel compliance with an arbitration agreement).

<sup>12</sup>"Arbitration under the Act is a matter of consent, not coercion. . . ." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 479 (1989).

<sup>13</sup>Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 279 (1926). Cohen was the principal author of the Arbitration Act. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 413 (1967) (J. Black, dissenting).

<sup>14</sup>"Arbitration is a creature of contract, a device of the parties rather than the judicial process." *AMF, Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 460 (E.D. N.Y. 1985). The text of the Arbitration Act "reflects the overarching principle that arbitration is a matter of contract." *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013). As the House Judiciary Committee said in its report on the bill, "Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement." H. Rept. 68–96 (1924).

<sup>15</sup>9 U.S.C. § 2. In *Bernhardt v. Polygraphic Co.*, the Supreme Court held that the Arbitration Act applies to "only two types of contracts: those relating to a maritime transaction and those involving commerce." 350 U.S. 198, 200 (1956).

<sup>16</sup>"The legislative hearings and debate leading up to the [Act's] passage evidence Congress' aim to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate commercial disputes." *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1642–1643 (2018) (J. Ginsburg, dissenting) (emphasis in original).

<sup>17</sup>Cohen & Dayton, 12 Va. L. Rev. at 265. Arbitration was considered to be "particularly adapted to the settlement of commercial disputes." *Id.* at 279.

<sup>18</sup>*Epic Systems Corp. v. Lewis*, 138 S. Ct. at 1642 (J. Ginsburg, dissenting). "The principal support for the Act came from trade associations dealing in groceries and other perishables and from commercial and mercantile groups in the major trading centers." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. at 409 n.2 (J. Black, dissenting).

Proponents of arbitration saw it as “peculiarly suited to the disposition of the ordinary disputes between merchants.” Commercial disputes tended to involve “questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance and the like.”<sup>19</sup> These types of “factual questions in regard to the day-to-day performance of contractual obligations”<sup>20</sup> did not require knowledge of the law as much as knowledge of the standards and practices of the business world. Arbitration afforded businessmen “prompt, economical and adequate solution of controversies” in exchange for “less certainty of legally correct adjustment” of their contractual rights.<sup>21</sup>

At the same time, the sponsors of the Arbitration Act recognized that “[n]ot all questions arising out of contracts ought to be arbitrated.” They recognized that arbitration “is not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes. . . . It is not a proper remedy for . . . questions with which the arbitrators have no particular experience and which are better left to the determination of skilled judges with a background of legal experience and established systems of law.”<sup>22</sup>

#### *Arbitration of statutory rights*

For 60 years after the enactment of the Arbitration Act, the Supreme Court adhered to the original view that the Act was meant to apply to commercial contract claims, not statutory ones.<sup>23</sup> The leading case on this point was *Wilko v. Swan*.<sup>24</sup> In that case, a customer sued his stockbrokers to enforce his rights under the Securities Act of 1933. The stockbrokers sought a stay against the suit on the grounds that the customer had agreed to arbitrate any disputes. While acknowledging the advantages that arbitration agreements “provide for the solution of commercial controversies,” the Supreme Court held that the arbitration agreement in that case was invalid to the extent it compelled arbitration of the customer’s statutory rights.<sup>25</sup>

The Court’s decision in *Wilko v. Swan* rested on the Court’s determination that arbitration was less protective of statutory rights than litigation.<sup>26</sup> The Court based that determination on two grounds. The first was that cases involving statutory rights tended to raise complex legal questions that needed to be decided by a

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<sup>19</sup> Cohen & Dayton, 12 Va. L. Rev. at 281.

<sup>20</sup> *Prima Paint Corp.*, 388 U.S. at 415 (J. Black, dissenting).

<sup>21</sup> *Wilko v. Swan*, 346 U.S. 427, 438 (1953). See also *American Almond Products Co. v. Consolidated Pecan Sales Co.*, 144 F.2d 448, 451 (2d Cir. 1944) (stating that “parties must decide” for themselves whether arbitration is “a desirable substitute for trials in court,” but if they agree to arbitration, “they must content themselves with looser approximations to the enforcement of their rights than those that the law accords them”).

<sup>22</sup> Cohen & Dayton, 12 Va. L. Rev. at 281.

<sup>23</sup> See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 646(1985) (J. Stevens, dissenting) (“Until today, all of our cases enforcing agreements to arbitrate under the Arbitration Act have involved contract claims.”).

<sup>24</sup> 346 U.S. 427 (1953).

<sup>25</sup> 346 U.S. at 438.

<sup>26</sup> 346 U.S. at 435 (stating that the “effectiveness” of statutory protections “is lessened in arbitration as compared to judicial proceedings”).

judge.<sup>27</sup> The second was that the arbitrator's decision was not subject to judicial review for legal error.<sup>28</sup>

Later cases echoed the Court's concern in *Wilko v. Swan* that arbitrators "may not . . . have the expertise required to resolve complex legal questions that arise" in statutory cases.<sup>29</sup> Many arbitrators are not lawyers, the Court noted, and thus they "may not be conversant with the public law considerations underlying" the statutory right. Statutory claims typically involve complex legal questions, which "must be resolved in light of volumes of legislative history and . . . decades of legal interpretation and administrative rulings. Although an arbitrator may be competent to resolve many preliminary factual questions, . . . he may lack the competence to decide the ultimate legal issue . . . under the statute. . . ."<sup>30</sup>

"Moreover," the Court added, "even though a particular arbitrator may be competent to interpret and apply statutory law, he may not have the contractual authority to do so."<sup>31</sup> This is because of "the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation."<sup>32</sup> "An arbitrator's power is both derived from, and limited by," the arbitration agreement.<sup>33</sup> An arbitrator "has no general authority to invoke public laws that conflict with the bargain between the parties."<sup>34</sup>

"Finally, . . . arbitral procedures are less protective of individual statutory rights than are judicial procedure."<sup>35</sup> This is because "the factfinding process in arbitration is not equivalent to judicial factfinding. The record of arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures . . . , such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable."<sup>36</sup>

For all of these reasons, the Court repeatedly found that arbitration "cannot provide an adequate substitute for a judicial proceeding in protecting . . . federal statutory and constitutional rights. . . ."<sup>37</sup> "Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the resolution of rights created by" statute.<sup>38</sup>

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<sup>27</sup> 346 U.S. at 435–436.

<sup>28</sup> 346 U.S. at 436–437 (citing both 9 U.S.C. § 10, which allows a court to vacate an arbitrator's decision only for misconduct and not for legal error, and the fact that the arbitrator is not required to explain the reason for the decision or keep a complete record of the proceeding).

<sup>29</sup> *McDonald v. West Branch*, 466 U.S. 264, 290 (1984).

<sup>30</sup> *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 743 (1981). The "specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land." *Id.*, quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974).

<sup>31</sup> *Barrentine*, 450 U.S. at 744.

<sup>32</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56–57 (1974).

<sup>33</sup> *Barrentine*, 450 U.S. at 744.

<sup>34</sup> *Id.*, quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. at 53 (1974).

<sup>35</sup> *Barrentine*, 450 U.S. at 744.

<sup>36</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. at 57–58. Different procedures may lead to different results. As the Supreme Court has said, "arbitration, whatever its merits or shortcomings, substantially affects the cause of action. . . . The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result." *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 203 (1956).

<sup>37</sup> *McDonald v. West Branch*, 466 U.S. at 290.

<sup>38</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. at 56.

### *The expanded use of arbitration*

We recognize, of course, that the use of arbitration has expanded far beyond bilateral contract disputes between merchants in recent years.<sup>39</sup> This expansion might fairly be traced to the Supreme Court's decision in 1983 in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*.<sup>40</sup> In that case, the Court discovered, for the first time in the Act's then 58-year history, that it established a "liberal federal policy favoring arbitration."<sup>41</sup>

In keeping with this newly discovered preference, the Supreme has steadily expanded the reach of the Arbitration Act over the past 35 years. Indeed, in Justice Stevens' view, "the Court 'has effectively rewritten'" the Arbitration Act.<sup>42</sup> Or as Justice O'Connor observed, "the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."<sup>43</sup>

The Arbitration Act's original, limited purpose bears repeating. It was to give "merchants an expeditious, economical means of resolving their disputes,"<sup>44</sup> by making them enforceable.<sup>45</sup> "The legislative hearings and debate leading up to the [Act's] passage evidence Congress' aim to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate commercial disputes."<sup>46</sup> It "also shows that Congress did not intend the statute to apply to arbitration provisions in employment contracts."<sup>47</sup> "Congress never endorsed a policy favoring arbitration where one party sets the terms of an agreement while the other is left to 'take it or leave it.'"<sup>48</sup>

Nonetheless, in furtherance of its view that the Arbitration Act requires that "any doubts concerning the scope of arbitrable issues

<sup>39</sup> Arbitration also has a long history in resolving labor disputes. Indeed, Congress first authorized the use of arbitration to settle labor disputes in the Railroad Arbitration Act of 1888, 25 Stat. 501, long before the enactment of the Federal Arbitration Act. Perhaps for this reason, the Arbitration Act expressly excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from its coverage. 9 U.S.C. § 1. The Supreme Court has said that "arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). "In the commercial case, arbitration is the substitute for litigation. [In labor disputes,] arbitration is the substitute for industrial strife." *Id.* In spite of this distinction, "the federal courts have often looked to the [Arbitration] Act for guidance in labor arbitration cases." *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987).

<sup>40</sup> 460 U.S. 1 (1983).

<sup>41</sup> 460 U.S. at 24. Lower courts have understood this to me that the policy is one "favoring arbitration over litigation." E.g., *Seaboard Coast Line Railroad Co. v. Trailer Train Co.*, 690 F.2d 1343, 1348 (11th Cir. 1982).

<sup>42</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 42–43 (1991) (J. Stevens, dissenting), quoting his own words in *Perry v. Thomas*, 482 U.S. 483, 493 (1987) (J. Stevens, dissenting). See also *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1643 (2018) (J. Ginsburg, dissenting) (stating that the Court "has veered away from Congress' intent simply to afford merchants a speedy and economical means of resolving commercial disputes").

<sup>43</sup> *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (J. O'Connor, concurring).

<sup>44</sup> *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1642 (J. Ginsburg, dissenting).

<sup>45</sup> *Gilmer*, 500 U.S. at 24 (stating that the purpose of the Act "was to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts"); *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 404 n.12 (1967) (stating that the purpose of the Act "was to make arbitration agreements as enforceable as other contracts, but not more so").

<sup>46</sup> *Epic Systems Corp.*, 138 S. Ct. at 1642–1643 (J. Ginsburg, dissenting) (emphasis in original).

<sup>47</sup> *Id.* at 1643.

<sup>48</sup> *Id.* See also *Prima Paint Corp.*, 388 U.S. at 403 n.9 ("We note that categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act.").

should be resolved in favor or arbitration,”<sup>49</sup> the Supreme Court has in recent years enforced agreements to arbitrate statutory claims as well as commercial ones,<sup>50</sup> and it has enforced arbitration agreements between “powerful economic enterprises” and their less powerful customers and employees.<sup>51</sup>

The line of cases extending the Arbitration Act to statutory claims began with the Court’s decision in *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth* in 1985.<sup>52</sup> The question in that case was whether the Arbitration Act required the courts to compel a car dealer to submit its statutory antitrust claim against an automaker to arbitration pursuant to the arbitration clause in their contract. Invoking its “policy favoring arbitration,” the Court held that the Act did.<sup>53</sup> The Court reasoned that “[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. . . . Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”<sup>54</sup>

Nonetheless, the Court continued to recognize that “not . . . all controversies implicating statutory rights are suitable for arbitration.”<sup>55</sup> Importantly, the Court established an important exception to the general presumption that courts must enforce agreements to arbitrate statutory claims: they must only “so long as the prospective litigant effectively may vindicate its statutory cause of action in” arbitration.<sup>56</sup> This exception, known as the “effective-vindication” rule, “prevent[s] arbitration clauses from choking off a plaintiff’s ability to enforce congressionally created rights.” It “bars applying [an arbitration] clause when . . . it operates to confer immunity from potentially meritorious federal claims.”<sup>57</sup>

#### *The Administrative Dispute Resolution Act of 1996*

The Arbitration Act provides for judicial enforcement of agreements to arbitrate private disputes, not disputes with federal agencies.<sup>58</sup> Indeed, for many years, the Department of Justice took the

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<sup>49</sup> *Moses H. Cone*, 460 U.S. at 25–26.

<sup>50</sup> E.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (“It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the Arbitration Act.”).

<sup>51</sup> *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (J. Ginsburg, dissenting). The Court narrowed the Arbitration Act’s exemption for employment contracts to exclude only transporter workers’ contracts from the Act’s scope in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

<sup>52</sup> 473 U.S. 614 (1985). The Court subsequently overruled *Wilko v. Swan* (which held that statutory claims were not subject to arbitration) in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). See also *Gilmer*, 500 U.S. at 26 (citing cases holding statutory claims are subject to arbitration).

<sup>53</sup> 473 U.S. at 625.

<sup>54</sup> 473 U.S. at 628.

<sup>55</sup> 473 U.S. at 627; *Gilmer*, 500 U.S. at 26 (stating that “all statutory claims may not be appropriate for arbitration”).

<sup>56</sup> 473 U.S. at 637.

<sup>57</sup> *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 240 (2013) (J. Kagan, dissenting).

<sup>58</sup> 32 Comp. Gen. 333 (1953) (“The . . . Arbitration Act apparently has never been held to include with its scope transactions to which the United States is a party.”). The Comptroller General repeatedly advised agencies that “the rights of the United States may not be determined by binding arbitration”). E.g., 1972 U.S. Comp. Gen. LEXIS 2084 (1972).

position that it would be unconstitutional for a federal agency to submit to binding arbitration without specific statutory authorization.<sup>59</sup> But then, in 1995, the Justice Department reversed itself and decided that the Constitution does not bar federal agencies from agreeing to binding arbitration after all.<sup>60</sup> The following year, Congress enacted the Administrative Dispute Resolution Act of 1996,<sup>61</sup> to authorize federal agencies to agree to binding arbitration.

Importantly, though, the Administrative Dispute Resolution Act does not impose binding arbitration on anyone. It clearly says, in one section, that an agency “may” use arbitration “if the parties agree to” it.<sup>62</sup> In another, it says that “Arbitration may be used . . . whenever all parties consent.”<sup>63</sup>

Moreover, the Act emphasizes that consent to arbitration may not be coerced. “An agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit.”<sup>64</sup>

In addition, the Act recognizes that arbitration is not appropriate for all agency disputes. It lists six broad factors agencies must consider to determine if the use of arbitration is appropriate.<sup>65</sup> In practice, federal agencies prefer mediation over arbitration to settle disputes.<sup>66</sup>

#### *The Alternative Dispute Resolution Act of 1998*

Congress has also authorized federal district courts to use court-annexed arbitration, whereby arbitrators issue non-binding decisions, without prejudice to the parties’ right to judicial review. The Judicial Improvements and Access to Justice Act of 1988<sup>67</sup> created “an experimental pilot program of court-annexed arbitration in selected Federal courts in order to encourage prompt, informal and

<sup>59</sup> Testimony of then Assistant Attorney General William Barr, S. Hrg. 101–494, at 10–13, 86–106 (1989). The Justice Department’s principal concern was that private arbitrators would not be appointed in accordance with the Constitution’s Appointments Clause, but it also raised concerns under the Constitution’s Take Care Clause, Article III (vesting judicial power in the courts), and the Due Process Clause of the Fifth Amendment. S. Rept. 101–543, 5 (1990). See also *Tenaska Washington Partners, L.P. v. United States*, 34 Fed. Cl. 434, 438–439 (1995).

<sup>60</sup> Constitutional Limitations on Federal Government Participation in Binding Arbitration, 19 Op. O.L.C. 208 (1995).

<sup>61</sup> Public Law 104–320, 110 Stat. 3870, codified at 5 U.S.C. § 571 et seq. Congress had previously enacted the Administrative Dispute Resolution Act, Public Law 101–552, 104 Stat. 2736, in 1990. But, in deference to the Justice Department’s constitutional concerns, it stopped short of affording binding arbitration. Agencies could only agree to non-binding arbitration, which gave them the discretion to accept or reject an arbitrator’s award. The 1996 law made the Administrative Dispute Resolution Act permanent and provided for binding arbitration.

<sup>62</sup> 5 U.S.C. § 572.

<sup>63</sup> 5 U.S.C. § 575(a)(1).

<sup>64</sup> 5 U.S.C. § 575(a)(3).

<sup>65</sup> 5 U.S.C. § 572(b). These factors include consideration of whether a definitive or authoritative resolution of the dispute is needed for precedential value, whether the dispute raises significant questions of government policy that require additional procedures, whether maintaining established policies is important to ensure consistent results, whether the matter significantly affects persons who are not parties to the proceedings, whether a complete public record of the proceeding needs to be kept, and whether the agency needs to maintain continuing jurisdiction over the matter.

<sup>66</sup> The Administrative Dispute Resolution Act authorizes federal agencies to use mediation as an alternative means of dispute resolution. 5 U.S.C. § 571(3). The difference between mediation and arbitration is that, in mediation, a mediator helps the parties find a mutually acceptable resolution of their dispute. In arbitration, the arbitrator decides the dispute and the parties must abide by his or her decision. *Thompson v. Kellogg Brown & Root*, 2008 U.S. Dist. LEXIS 38425 at 13 (E.D. Va. 2008).

<sup>67</sup> Public Law 100–702, § 901, 102 Stat. 4659.

inexpensive resolution of civil cases.”<sup>68</sup> It allowed ten selected district courts to require arbitration in certain civil cases. Importantly, though, it also allowed any party that was dissatisfied with the arbitrator’s decision, to “demand” a trial before a judge, who would decide the case anew, without regard to the arbitrator’s decision.<sup>69</sup>

In addition, the 1988 law made it clear that arbitration was not appropriate in all cases. It expressly excepted cases involving “complex or novel legal issues,” cases in which “legal issues predominate over factual issues,” or other cases for “good cause.”<sup>70</sup>

Ten years later, Congress passed the Alternative Dispute Resolution Act of 1998,<sup>71</sup> to replace the pilot program with broader, permanent authority for federal district courts to use court-annexed arbitration. On the advice of the Justice Department and judges, Congress authorized district courts to use mediation and other forms of alternative dispute resolution as well as arbitration.<sup>72</sup>

As the law now stands, all federal district courts can require mediation, but they can only use arbitration “if the parties consent.”<sup>73</sup> Moreover, the parties’ consent may not be coerced. It must be “freely and knowingly obtained.”<sup>74</sup> The law also directs courts to exempt specific cases or categories of cases if arbitration “would not be appropriate.”<sup>75</sup> Parties dissatisfied with the arbitrator’s decision may still “demand” a trial before a judge, who would decide the case anew, without regard to the arbitrator’s decision.<sup>76</sup>

#### *Core principles*

Three important principles are apparent from this historical review. The first is that arbitration must be voluntary. One side cannot impose arbitration on the other. Both sides must willingly agree to submit their dispute to arbitration. The Arbitration Act, the Administrative Dispute Resolution Act of 1996, and the Alternative Dispute Resolution Act of 1998 all make arbitration voluntary, not mandatory.<sup>77</sup>

The second is that arbitration is not appropriate in all cases.<sup>78</sup> This fact is plainly recognized in the Administrative Dispute Reso-

<sup>68</sup> S. Rept. 100–889 at 30–31 (1988).

<sup>69</sup> 28 U.S.C. § 655 note (28 U.S.C. § 655(a) prior to 1998 amendment).

<sup>70</sup> 28 U.S.C. § 652 note (28 U.S.C. § 652(c) prior to 1998 amendment).

<sup>71</sup> Public Law 105–315, 112 Stat. 2993, codified at 28 U.S.C. § 651 *et seq.* The 1998 law amended provisions first enacted by section 901(a) of the Judicial Improvements and Access to Justice Act of 1988.

<sup>72</sup> 28 U.S.C. § 651; Hearing on H.R. 2603 before the House Judiciary Committee at 4–10 (Justice Department testimony) and 13–17 (testimony of Chief Judge Hornby) (1997). Chief Judge Hornby testified that “arbitration is not the most preferred method” of alternative dispute resolution. “In fact, it’s one of the less preferred methods. . . . [W]e believe that requiring mandatory arbitration programs is not a good idea. . . . [W]e would encourage you . . . to make it permissive.” *Id.* at 14.

<sup>73</sup> 28 U.S.C. § 652(a); 28 U.S.C. § 654(a).

<sup>74</sup> 28 U.S.C. § 654(b)(1).

<sup>75</sup> 28 U.S.C. § 652(b).

<sup>76</sup> 28 U.S.C. § 657(c).

<sup>77</sup> All three laws reflect the principle that “a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). See also Administrative Conference of the U.S., Agencies’ Use of Alternative Means of Dispute Resolution, Recommendation No. 86–3 (1986) (“All parties to the dispute must knowingly consent to use the arbitration procedures. . . .”).

<sup>78</sup> There is bipartisan agreement on this point. Letter of Attorney General Loretta Lynch to President Obama transmitting the 2016 Report on Significant Developments in Federal Alternative Dispute Resolution (Jan. 9, 2017); Letter of Attorney General Alberto Gonzales to President Bush transmitting the Report for the President on the Use and Results of Alternative Dispute Resolution in the Executive Branch of the Federal Government (April 27, 2007) (both stat-

lution Act, which lists six factors that make arbitration inappropriate to resolve a particular dispute. These factors require agencies to consider not using arbitration when a definitive resolution of the dispute is needed for precedential value, when significant government policies are involved, when maintaining established policies and consistent results are important, when the decision will affect persons who are not parties to the proceeding, when a full public record is needed, or when the agency needs to maintain continuing jurisdiction over the matter.<sup>79</sup>

Third, while arbitration offers a faster and less expensive means of resolving disputes in many cases,<sup>80</sup> it should not be used to deprive unwilling participants of their legal rights by foreclosing the “effective vindication” of those rights.<sup>81</sup>

#### S. 2160

S. 2160 violates all three of these core principles. First, S. 2160 is compulsory. It takes the right to go to court away from people who never agreed to surrender that right. Once the Forest Service<sup>82</sup> designates a project for arbitration, arbitration becomes the only way people affected by the project can challenge it. Section 2(b)(4) of the bill makes arbitration “the exclusive means of review for the project.” Section 2(b)(5) states that a project designated for arbitration “shall not be subject to judicial review.” Section 2(e)(3) provides that if someone tries to request judicial review of the project, the Forest Service can move to compel arbitration and the court “shall compel arbitration.” None of this is consistent with private arbitration under the Federal Arbitration Act, federal agency arbitration under the Administrative Dispute Resolution Act, or court-annexed arbitration under the Alternative Dispute Resolution Act.

Second, arbitration is not appropriate for the types of cases covered by S. 2160. Arbitration works best in bilateral disputes in which the issues are few, fact specific, and quantitative.<sup>83</sup> Arbitration is less suited to cases raising complex or novel legal issues or those in which legal issues predominate over factual ones.<sup>84</sup> Federal agencies use it mostly to settle workplace disputes with their employees or procurement disputes with their contractors.<sup>85</sup> S.

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ing “The Report concludes that alternative dispute resolution is often a useful tool, but is not necessarily appropriate for all cases.”).

<sup>79</sup> 5 U.S.C. § 572(b). These factors were originally proposed by the Administrative Conference. H. Rept. 101–513 at 12 (1990). See also S. Rept. 101–543 at 9–10 (1990); Administrative Conference, Recommendation No. 86–3 (1986).

<sup>80</sup> 5 U.S.C. § 571 note (congressional findings). “By agreeing to arbitrate . . . , a party . . . trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985).

<sup>81</sup> *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 242 (2013) (J. Kagan, dissenting).

<sup>82</sup> S. 2160 uses the term “Secretary,” but section 2(a)(6) defines “Secretary” to mean “the Secretary of Agriculture, acting through the Chief of the Forest Service.”

<sup>83</sup> Department of Justice, Developing Guidance for Binding Arbitration—A Handbook for Federal Agencies, 65 Fed. Reg. 50005, 50009 (Aug. 16, 2000). “Cases subject to arbitration should involve questions of fact or the application of well-established norms. . . .” Administrative Conference of the U.S., Arbitration in Federal Programs, Recommendation No. 87–5 (1987).

<sup>84</sup> 28 U.S.C. § 652 note (original exemption from arbitration for court-annexed arbitration). Congress amended this provision in 1998 to give the courts still wider discretion to exempt cases in which arbitration “would not be appropriate.” 28 U.S.C. § 652(b).

<sup>85</sup> See generally, Report for the President on the Use and Results of Alternative Dispute Resolution in the Executive Branch of the Federal Government (April 27, 2007).

2160, on the other hand, would compel arbitration of the lawfulness of highly complex forest management issues implicating diverse public interests. Resolution of these issues involves “significant questions of Government policy,” requires the maintenance of established policies, and “significantly affects persons or organizations who are not parties” to the arbitration proceeding. These are precisely the considerations that Congress said make arbitration inappropriate.<sup>86</sup>

Moreover, arbitration has traditionally been used as a substitute for trying a case in a trial court, not as a substitute for appellate review of a final agency action under the Administrative Procedure Act. In arbitration, as in a trial, parties are given an equal opportunity to present their case to a neutral decision maker who finds in favor of one or the other,<sup>87</sup> based on which one is more persuasive.<sup>88</sup> Judicial review of an agency action under the Administrative Procedure Act is fundamentally different. It is an appellate review of the agency’s action, not a trial.<sup>89</sup> The court reviews the administrative record to see if the agency complied with substantive and procedural legal requirements and upholds the agency’s decision unless it is “arbitrary and capricious.”<sup>90</sup> The court does not engage in independent fact-finding<sup>91</sup> or weigh the agency’s decision against competing proposals. It does not decide what is best.<sup>92</sup> It simply upholds the agency’s decision unless the agency is clearly wrong.<sup>93</sup>

S. 2160 tries to use arbitration, not as a substitute for the Forest Service’s pre-decisional administrative review process,<sup>94</sup> but as a

<sup>86</sup> 5 U.S.C. § 572(b).

<sup>87</sup> In a trial, the court generally “presume[s] nothing about the case’s merits and divide[s] burdens of proof and production almost equally between the plaintiff and defendant.” *Jarita Mesa Livestock Grazing Association v. U.S. Forest Service*, 58 F. Supp. 3d 1191, 1239 (D. N.M. 2014); *Northern New Mexicans Protecting Land Water & Rights v. United States*, 2015 U.S. Dist. LEXIS 164739 at 25 (D. N.M. 2015).

<sup>88</sup> Arbitrators generally apply the same burden of proof used in civil and administrative proceedings. R. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 U.C.L.A. L. Rev. 949, 1074 (2000), citing *Sea Island Broadcasting Corp. v. FCC*, 627 F.2d 240, 243 (D.C. Cir. 1980) (“the ‘preponderance of evidence’ standard is the traditional standard in civil and administrative proceedings”).

<sup>89</sup> “Review of agency actions comes to the Court in the form of an appeal,” rather than a trial, under the Administrative Procedure Act. *Jarita Mesa*, 58 F. Supp. 3d at 1238.

<sup>90</sup> 5 U.S.C. § 706(2)(A) (requiring courts to “hold unlawful and set aside agency actions, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” An action is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43 (1983).

<sup>91</sup> “Judicial review of administrative agency decisions” under the Administrative Procedure Act “is based on the administrative record compiled by the agency, not on independent fact-finding by the . . . court.” *Alliance for the Wild Rockies v. U.S. Forest Service*, 2016 U.S. Dist. LEXIS 118574 at 7 (D. Ida. 2016), citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (in applying the arbitrary and capricious standard, “the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court”).

<sup>92</sup> “A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives. Rather, a court must uphold [the agency’s decision] if the agency has ‘examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.’” *FERC v. Electric Power Supply Association*, 136 S. Ct. 760, 782 (2016), quoting *Motor Vehicle Manufacturers*, 463 U.S. at 43.

<sup>93</sup> *Mt. St. Helens Mining & Recovery Ltd. Partnership v. United States*, 384 F.3d 721 (9th Cir. 2004), quoting *California Trout v. Schaefer*, 58 F.3d 469, 473 (9th Cir. 1995) (a “court will overturn an agency’s decision only if the agency committed a ‘clear error of judgment.’”).

<sup>94</sup> Section 105 of the Healthy Forests Restoration Act of 2003 directed the Forest Service to “establish a pre-decisional administrative review process . . . [to] serve as the sole means by which a person can seek administrative review regarding an authorized hazardous fuel reduc-

substitute for judicial review of the Forest Service's final decision—in other words, not as a substitute for a trial, but for an appeal. In so doing, it mixes elements of arbitration, by structuring the arbitrator's task as considering competing proposals and choosing the best one, with the Administrative Procedure Act's standard of review. The resulting hybrid is an unsuitable substitute for judicial review.

S. 2160 limits the projects subject to this unorthodox procedure to certain forest management projects that reduce either hazardous fuels or the risk of insect or disease infestation. These challenges typically claim that the Forest Service has violated the National Environmental Policy Act, the Endangered Species Act, the National Forest Management Act, or the Healthy Forests Restoration Act.<sup>95</sup> Whether a project has violated any of these laws is a question of law, best left to judges rather than private arbitrators.<sup>96</sup>

Third, S. 2160 arbitrarily deprives environmental groups of their right to an adequate forum in which they can effectively vindicate their statutory rights. As already discussed, the Supreme Court has upheld the use of arbitration to decide statutory claims “so long as the prospective litigant effectively may vindicate its statutory cause of action” in the arbitration proceeding.<sup>97</sup> “By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.”<sup>98</sup>

S. 2160 would prevent environmental groups from directly and exclusively challenging a project's lawfulness. As we have seen, most challenges to hazardous fuel reduction projects are based on a claim that the Forest Service's approval of the project violates one or more federal environmental laws. But under S. 2160, it is not enough for an opponent to show that the project violates a law; the opponent must propose an alternative project that serves the same purpose and meets the same needs as the Forest Service's project as well. Section 2(e)(2)(A) gives the opponent only 30 days in which to complete this feat. Section 2(e)(2)(C) provides that if the opponent fails to meet this heavy burden, it loses its standing to arbitrate the case. In other words, in order to prevail on its claim that the Forest Service project cannot legally be done, the opponent must prove, by a preponderance of evidence,<sup>99</sup> that essentially the same project can legally be done in another way.

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tion project on Forest Service land.” 16 U.S.C. § 6515. Section 428 of the Consolidated Appropriations Act of 2012 subsequently directed the Forest Service to apply the pre-decisional administrative review process to all of the Forest Service's proposed forest management actions documented with a record of decision or decision notice, in place of a post-decisional administrative appeal process. 16 U.S.C. § 6515 note. The process is codified at 36 C.F.R. Part 218. See 78 Fed. Reg. 18481 (Mar. 27, 2013).

<sup>95</sup> E.g., *Native Ecosystems Council v. Erickson*, 2018 U.S. Dist. LEXIS 129199 at 2 (D. Mont. 2018).

<sup>96</sup> See, e.g., *Center for Biological Diversity v. Kempthorne*, 588 F.3d 701, 708 (9th Cir. 2009) (“whether an agency action is arbitrary and capricious is a legal question”).

<sup>97</sup> *Mitsubishi*, 473 U.S. at 637.

<sup>98</sup> 473 U.S. at 628. See also *Nesbitt v. FCNH, Inc.*, 811 F.3d 371, 377 (10th Cir. 2016), quoting *Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.3d 1230, 1235 (10th Cir. 1999) (“an arbitration agreement that prohibits use of the judicial forum as a means of resolving statutory claims must also provide for an effective and accessible alternative forum”).

<sup>99</sup> S. 2160 is silent on the standard of review the arbitrator should apply to the opponent's alternative proposal. As previously noted, arbitrators generally apply the same burden of proof used in civil and administrative proceedings, which is a preponderance of evidence. See footnote 88 above. “Preponderance of the evidence . . . means the greater weight of evidence, evidence

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Even if an opponent is able to meet the burden of proposing an alternative project, section 2(i) of the bill stacks the deck against the opponent's alternative proposal. It permits the arbitrator to rule against the Forest Service's proposal only if it is arbitrary and capricious. The arbitrary and capricious standard is highly deferential.<sup>100</sup> It affords the Forest Service's decision "a presumption of regularity," which can only be overcome if the agency committed a "clear error of judgment."<sup>101</sup> S. 2160 affords no such deference or presumption to the opponent's alternative proposal.

Moreover, it is not at all clear from the text of S. 2160, whether an arbitrator would be able to enjoin the Forest Service from proceeding with a project pending the arbitrator's final decision. Normally, arbitrators are given the power to grant preliminary injunctions either expressly in the arbitration agreement or by incorporation of the rules of the American Arbitration Association into the arbitration agreement.<sup>102</sup> In addition, courts have normally been willing to grant preliminary injunctions pending arbitration, even though the Arbitration Act requires them to stay the trial until such arbitration has been completed.<sup>103</sup> The courts have reasoned that the Arbitration Act's requirement that courts stay their trial proceedings until arbitration has been completed only extends to the trial itself and not to preliminary injunctions or other pre-trial proceedings.<sup>104</sup> Thus, "An injunction to preserve the *status quo* pending arbitration may be issued . . . where it is necessary to prevent conduct by the party enjoined from rendering the arbitral process a hollow formality in those instances where . . . the arbitral award when rendered could not return the parties substantially to the *status quo ante*."<sup>105</sup> Preliminary relief is especially important in timber-cutting cases to prevent the Forest Service from proceeding with a project before the arbitrators make a final determination. A decision in favor of the opponent would be "a hollow formality" after the trees are cut.<sup>106</sup>

But S. 2160 does not give the Forest Service's arbitrators authority to grant preliminary injunctions. It does not provide for arbitration agreements that might and it does not apply the rules of the American Arbitration Association to Forest Service arbitrations. Moreover, by providing that the Forest Service projects that are

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which is more convincing that the evidence which his offered in opposition to it." *Hale v. Department of Transportation*, 772 F.2d 882, 885 (Fed. Cir. 1985).

<sup>100</sup>The arbitrary and capricious "standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park v. Department of Transportation*, 401 U.S. 402, 416 (1971). An agency's decision must be upheld so long as it "was based on a consideration of the relevant factors and . . . there has been [no] clear error of judgment." *Id.* See also footnotes 90 and 92 above.

<sup>101</sup>*San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014).

<sup>102</sup>American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures, R-37 (2013) ("The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief . . .").

<sup>103</sup>E.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 753 (4th Cir. 1985) (holding "that where a dispute is subject to mandatory arbitration under the Federal Arbitration Act, a district court has the discretion to grant a preliminary injunction to preserve the status quo pending the arbitration of the parties' dispute if the enjoined conduct would render that process a 'hollow formality.'").

<sup>104</sup>756 F.2d at 1052.

<sup>105</sup>756 F.2d at 1053, quoting *Lever Brothers Co. v. International Chemical Workers Union, Local 217,554* F.2d 115, 123 (4th Cir. 1976).

<sup>106</sup>"Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Production Co. v. Gambell*, 480 U.S. 531, 545 (1987).

subject to arbitration under the bill “shall not be subject to judicial review,” the bill creates a strong inference that courts may not be able grant preliminary injunctions. Unlike section 3 of the Arbitration Act, which requires courts to stay “trials,” section 2(b)(5) of the bill bars “judicial review.” The concept of a “proceeding for judicial review” in the Administrative Procedure Act is broader than that of a “trial” in the Arbitration Act. Under the Administrative Procedure Act, “judicial review” embraces “any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus.”<sup>107</sup> As a result, it appears that the bill’s ban on “judicial review” may preclude preliminary relief needed to preserve the *status quo* pending the outcome of arbitration.

Simply put, the arbitration proceeding mandated by S. 2160 would not allow environmental groups to effectively vindicate their rights, it would “chok[e] off” their ability to effectively challenge the Forest Service’s project, and it “operates to confer immunity” on the Forest Service “from ‘potentially meritorious federal claims.’”<sup>108</sup>

### *Conclusion*

Like our colleagues, we recognize that many of our national forests are in urgent need of thinning to reduce hazardous fuel loads, to reduce the risk of catastrophic wildfires, and to restore forest health. But we cannot agree that replacing judicial review with forced arbitration is either necessary or even a useful way to promote forest health.<sup>109</sup>

Nor do we share our colleagues’ unfavorable view of environmental litigation. Although not universally appreciated, environmental groups perform a valuable public service. Our laws require the Forest Service to manage the national forests, not just for their timber, but for recreation, for fish and wildlife, and for natural scenic, scientific, and historical values, “in the combination that will best meet the present and future needs of the American people.”<sup>110</sup> As the Supreme Court has observed, this is an “enormously complicated task,” which requires “striking a balance among the many competing uses” of our forests.<sup>111</sup>

In challenging a Forest Service project that it considers harmful to fish and wildlife, or natural scenic, scientific, and historical values, an environmental group is not only championing the interests of its members but serving the public more broadly by ensuring the legitimacy of the Forest Service’s actions. By preserving their access to the courts, we help ensure that Forest Service decisions are the product of reasoned decision making and strike a proper balance.

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<sup>107</sup> 5 U.S.C. § 703; *Jarita Mesa Livestock Grazing Association*, 58 F. Supp. 3d at 1238.

<sup>108</sup> *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 240 (2013) (J. Kagan, dissenting).

<sup>109</sup> Congress has already taken a number of steps to expedite hazardous fuel reduction projects, by streamlining environmental reviews (16 U.S.C. § 6514), administrative procedures (16 U.S.C. § 6515), and even judicial review (16 U.S.C. § 6516). In addition, the courts already possess the power to sanction litigants that file frivolous lawsuits that “cause unnecessary delay or needless increase . . . the cost of litigation.” Federal Rules of Civil Procedure, rule 11.

<sup>110</sup> 43 U.S.C. § 1702(c); *National Mining Association v. Zinke*, 877 F.3d 845, 872 (9th Cir. 2017).

<sup>111</sup> *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004).

For these reasons, we opposed reporting S. 2160 and cannot support its passage by the Senate.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes that no changes in existing law are made by the bill as ordered reported.

