

117TH CONGRESS
1ST SESSION

S. 2564

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.

IN THE SENATE OF THE UNITED STATES

JULY 29, 2021

Mr. DAINES (for himself, Mr. CRAPO, Mr. RISCH, and Ms. LUMMIS) introduced the following bill; which was read twice and referred to the Committee on Energy and Natural Resources

A BILL

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.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

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

6 **SEC. 2. ALTERNATIVE DISPUTE RESOLUTION PILOT PRO-**
7 **GRAM.**

8 (a) DEFINITIONS.—In this Act:

1 (1) ARBITRATOR.—The term “arbitrator”
2 means a person—

3 (A) selected by the Secretary under sub-
4 section (d)(1); and

5 (B) that meets the qualifications under
6 subsection (d)(2).

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

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

15 (A) has exhausted the administrative re-
16 view process under part 218 of title 36, Code
17 of Federal Regulations (or successor regula-
18 tions); or

19 (B) in the case of a project that is cat-
20 egorically excluded for purposes of the National
21 Environmental Policy Act of 1969 (42 U.S.C.
22 4321 et seq.), has participated in a collabo-
23 rative process under clause (i) or (ii) of sub-
24 section (c)(1)(A).

1 (4) PILOT PROGRAM.—The term “pilot pro-
2 gram” means the pilot program implemented under
3 subsection (b)(1).

4 (5) PROJECT.—The term “project” means a
5 project described in subsection (c).

6 (6) SECRETARY.—The term “Secretary” means
7 the Secretary of Agriculture, acting through the
8 Chief of the Forest Service.

9 (b) ARBITRATION PILOT PROGRAM.—

10 (1) IN GENERAL.—Not later than 2 years after
11 the date of enactment of this Act, the Secretary
12 shall issue a final rule to implement an arbitration
13 pilot program, to be carried out in the States of
14 Idaho, Montana, and Wyoming, as an alternative
15 dispute resolution in lieu of judicial review for
16 projects described in subsection (c).

17 (2) LIMITATION ON NUMBER OF PROJECTS.—

18 (A) IN GENERAL.—The Secretary may not
19 designate for arbitration under the pilot pro-
20 gram more than 2 projects per calendar year.

21 (B) EXCEPTION.—If the Secretary des-
22 ignates a project for arbitration under the pilot
23 program, and no participant initiates arbitra-
24 tion under subsection (e)(2), that project shall

1 not count against the limitation on the number
2 of projects under subparagraph (A).

3 (3) APPLICABLE PROCESS.—Except as other-
4 wise provided in this Act, the pilot program shall be
5 carried out in accordance with subchapter IV of
6 chapter 5 of title 5, United States Code.

7 (4) EXCLUSIVE MEANS OF REVIEW.—The alter-
8 native dispute resolution process under the pilot pro-
9 gram for a project designated for arbitration under
10 the pilot program shall be the exclusive means of re-
11 view for the project.

12 (5) NO JUDICIAL REVIEW.—A project that the
13 Secretary has designated for arbitration under the
14 pilot program shall not be subject to judicial review.

15 (c) DESCRIPTION OF PROJECTS.—

16 (1) IN GENERAL.—The Secretary, at the sole
17 discretion of the Secretary, may designate for arbi-
18 tration projects that—

19 (A)(i) are developed through a collabo-
20 rative process (within the meaning of section
21 603(b)(1)(C) of the Healthy Forest Restoration
22 Act of 2003 (16 U.S.C. 6591b(b)(1)(C)));

23 (ii) are carried out under the Collaborative
24 Forest Landscape Restoration Program estab-
25 lished under section 4003 of the Omnibus Pub-

1 lic Land Management Act of 2009 (16 U.S.C.
2 7303); or

3 (iii) are identified in a community wildfire
4 protection plan (as defined in section 101 of the
5 Healthy Forests Restoration Act of 2003 (16
6 U.S.C. 6511));

7 (B) have as a purpose—

8 (i) reducing hazardous fuels; or

9 (ii) reducing the risk of, or mitigating,
10 insect or disease infestation; and

11 (C) are located, in whole or in part, in a
12 wildland-urban interface (as defined in section
13 101 of the Healthy Forests Restoration Act of
14 2003 (16 U.S.C. 6511)).

15 (2) INCLUSION.—In designating projects for ar-
16 bitration, the Secretary may include projects that
17 are categorically excluded for purposes of the Na-
18 tional Environmental Policy Act of 1969 (42 U.S.C.
19 4321 et seq.).

20 (d) ARBITRATORS.—

21 (1) IN GENERAL.—The Secretary shall develop
22 and publish a list of not fewer than 15 individuals
23 eligible to serve as arbitrators for the pilot program.

1 (2) QUALIFICATIONS.—To be eligible to serve
2 as an arbitrator under this subsection, an individual
3 shall be—

4 (A) recognized by—

5 (i) the American Arbitration Associa-
6 tion; or

7 (ii) a State arbitration program; or

8 (B) a fully retired Federal or State judge.

9 (e) INITIATION OF ARBITRATION.—

10 (1) IN GENERAL.—Not later than 7 days after
11 the date on which the Secretary issues the applicable
12 decision notice or decision memo with respect to a
13 project, the Secretary shall—

14 (A) notify each applicable participant and
15 the Clerk of the United States District Court
16 for the district in which the project is located
17 that the project has been designated for arbi-
18 tration under the pilot program; and

19 (B) include in the applicable decision no-
20 tice or decision memo a statement that the
21 project has been designated for arbitration.

22 (2) INITIATION.—

23 (A) IN GENERAL.—A participant that has
24 received a notification under paragraph (1) and
25 is seeking to initiate arbitration for the applica-

1 ble project under the pilot program shall file a
2 request for arbitration with the Secretary not
3 later than 30 days after the date of receipt of
4 the notification.

5 (B) REQUIREMENT.—The request under
6 subparagraph (A) shall include an alternative
7 proposal for the applicable project that—

8 (i) describes each modification sought
9 by the participant with respect to the
10 project; and

11 (ii) is consistent with the goals and
12 objectives of the applicable land and re-
13 source management plan, all applicable
14 laws, regulations, legal precedent and pol-
15 icy directives, and the purpose and need
16 for the project.

17 (C) FAILURE TO MEET REQUIREMENTS.—
18 A participant who fails to meet the require-
19 ments of subparagraphs (A) and (B) shall be
20 considered to have forfeited their standing to
21 initiate arbitration under this paragraph.

22 (3) COMPELLED ARBITRATION.—

23 (A) IN GENERAL.—For any request for ju-
24 dicial review with respect to a project that the

1 Secretary has designated for arbitration under
2 the pilot program—

3 (i) the Secretary shall file in the ap-
4 plicable court a motion to compel arbitra-
5 tion in accordance with this Act; and

6 (ii) the applicable court shall compel
7 arbitration in accordance with this Act.

8 (B) FEES AND COSTS.—For any motion
9 described in subparagraph (A) for which the
10 Secretary is the prevailing party, the applicable
11 court shall award to the Secretary—

12 (i) full or partial court costs; and

13 (ii) full or partial attorney's fees.

14 (f) SELECTION OF ARBITRATOR.—For each arbitra-
15 tion initiated under this Act—

16 (1) each applicable participant shall propose 2
17 arbitrators; and

18 (2) the Secretary shall select 1 arbitrator from
19 the list of arbitrators proposed under paragraph (1).

20 (g) RESPONSIBILITIES OF ARBITRATOR.—

21 (1) IN GENERAL.—An arbitrator—

22 (A) shall address all claims or modifica-
23 tions sought by each party seeking arbitration
24 with respect to a project under this Act; but

1 (B) may consolidate into a single arbitra-
2 tion all requests to initiate arbitration by all
3 participants with respect to a project.

4 (2) CONSIDERATION OF PROPOSED PROJECTS
5 AND DECISION.—For each project for which arbitra-
6 tion has been initiated under this Act, the arbitrator
7 shall make a decision with respect to the project
8 by—

9 (A) selecting the project, as approved by
10 the Secretary;

11 (B) selecting the alternative proposal sub-
12 mitted by the applicable participant in the re-
13 quest for initiation of arbitration for the project
14 filed under subsection (e)(2)(A); or

15 (C) rejecting both options described in sub-
16 paragraphs (A) and (B).

17 (3) CONVENE HEARINGS.—In carrying out
18 paragraph (2), the arbitrator may convene the Sec-
19 retary and the participant, including by telephone
20 conference or other electronic means to consider—

21 (A) the administrative record;

22 (B) arguments and evidence submitted by
23 the Secretary and the participant;

24 (C) the project, as approved by the Sec-
25 retary; and

1 (D) the alternative proposal submitted by
2 the applicable participant in the request for ini-
3 tiation of arbitration for the project filed under
4 subsection (e)(2)(A).

5 (4) LIMITATIONS.—An arbitrator may not mod-
6 ify any project or alternative proposal contained in
7 a request for initiation of arbitration of a participant
8 under this Act.

9 (h) INTERVENTION.—A party may intervene in an ar-
10 bitration under this Act if, with respect to the project to
11 which the arbitration relates, the party—

12 (1) meets the requirements of Rule 24(a) of the
13 Federal Rules of Civil Procedure (or a successor
14 rule); or

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

18 (i) SCOPE OF REVIEW.—In carrying out arbitration
19 for a project, the arbitrator shall set aside the agency ac-
20 tion, findings, and conclusions found to be arbitrary, ca-
21 pricious, an abuse of discretion, or otherwise not in ac-
22 cordance with law, within the meaning of section
23 706(2)(A) of title 5, United States Code.

24 (j) DEADLINE FOR COMPLETION OF ARBITRATION.—
25 Not later than 90 days after the date on which arbitration

1 is initiated for a project under the pilot program, the arbi-
2 trator shall make a decision with respect to all claims or
3 modifications sought by the participant that initiated the
4 arbitration.

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

7 (1) shall not be considered to be a major Fed-
8 eral action;

9 (2) shall be binding; and

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

13 (l) ADMINISTRATIVE COSTS.—

14 (1) IN GENERAL.—The Secretary shall—

15 (A) be solely responsible for the profes-
16 sional fees of arbitrators participating in the
17 pilot program; and

18 (B) use funds made available to the Sec-
19 retary and not otherwise obligated to carry out
20 subparagraph (A).

21 (2) TRAVEL COSTS.—The Secretary—

22 (A) shall be solely responsible for reason-
23 able travel costs associated with the participa-
24 tion of an arbitrator in any meeting conducted
25 under subsection (g)(3); and

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

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

6 (m) REPORTS.—

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

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

19 (B) an evaluation of the arbitration proc-
20 ess, including any recommendations for im-
21 provements to the process;

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

24 (D) a summary of the impacts of each out-
25 come described in subparagraph (C) on the

1 timeline for implementation and completion of
2 the applicable project.

3 (2) GAO REVIEWS AND REPORTS.—

4 (A) REVIEW ON TERMINATION.—On termi-
5 nation of the pilot program under subsection
6 (n), the Comptroller General of the United
7 States shall review the implementation by the
8 Secretary of the pilot program, including—

9 (i) the reasons for selecting certain
10 projects for arbitration under the pilot pro-
11 gram;

12 (ii) the location and types of projects
13 that were arbitrated under the pilot pro-
14 gram;

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

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

21 (v) a description and survey of the ar-
22 bitrators who participated in the pilot pro-
23 gram;

24 (vi) the type and outcome of any re-
25 quests for judicial review with respect to a

1 project that the Secretary designated for
2 arbitration under the pilot program; and

3 (vii) any other items the Comptroller
4 General of the United States may find ap-
5 plicable for evaluating the pilot program.

6 (B) REPORT.—After completion of the re-
7 view described in subparagraph (A) and not
8 later than 1 year after termination of the pilot
9 program under subsection (n), the Comptroller
10 General of the United States shall submit to
11 the Committee on Agriculture, Nutrition, and
12 Forestry and the Committee on Energy and
13 Natural Resources of the Senate and the Com-
14 mittee on Natural Resources of the House of
15 Representatives a report, describing the results
16 of the applicable review.

17 (n) TERMINATION.—The Secretary may not des-
18 ignate a project for arbitration under the pilot program
19 on or after the date that is 5 years after the date on which
20 the Secretary issues a final rule to implement the pilot
21 program under subsection (b)(1).

22 (o) EFFECT.—Nothing in this Act affects the respon-
23 sibility of the Secretary to comply with—

24 (1) the Endangered Species Act of 1973 (16
25 U.S.C. 1531 et seq.);

- 1 (2) the National Environmental Policy Act of
- 2 1969 (42 U.S.C. 4321 et seq.); or
- 3 (3) other applicable laws.

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