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

NOVEMBER 16, 2017

Mr. Daines (for himself, Mr. Risch, and Mr. Crapo) introduced the following bill; which was read twice and referred to the Committee on Energy and Natural Resources

DECEMBER 5, 2018

Reported by Ms. Murkowski, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

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) PARTICIPANT.—The term "participant" means an individual or entity that files an objection or scoping comments on a draft environmental document with respect to a project that is subject to an objection at the project level under part 218 of title 36, Code of Federal Regulations (or successor regulations):

(2) PILOT PROGRAM.—The term "pilot program" means the pilot program established under subsection (b):

(3) PROJECT.—The term "project" means a project described in subsection (c):

(4) SECRETARY.—The term "Secretary" means the Secretary of Agriculture, acting through the Chief of the Forest Service:

(b) ARBITRATION PILOT PROGRAM.—Not later than 180 days after the date of enactment of this Act, the Secretary shall establish within Region 1 of the Forest Service an arbitration pilot program as an alternative dispute resolution process in lieu of judicial review for projects described in subsection (c):

(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) hazardous fuels reduction; or

(ii) mitigation of 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 receive categorical exclusions for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(d) Limitation on Number of Projects.—The Secretary may not designate for arbitration under the pilot program more than 2 projects per calendar year.

(e) Arbitrators.—

(1) Appointment.—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) certified by—

(i) the American Arbitration Association; or

(ii) a State arbitration program; or

(B) a fully retired Federal or State judge.

(f) Initiation of Arbitration.—

(1) In general.—Not later than 7 days after the date on which the Secretary issues the final decision 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 in accordance with this Act; and

(B) include in the decision document a statement that the project has been designated for arbitration.

(2) INITIATION.—

(A) IN GENERAL.—A participant may initiate arbitration regarding a project that has been designated for arbitration under this Act in accordance with—

(i) sections 571 through 584 of title 5, United States Code; and

(ii) this paragraph.

(B) REQUIREMENTS.—A request to initiate arbitration under subparagraph (A) shall—

(i) be filed not later than the date that is 30 days after the date of the notification by the Secretary under paragraph (1); and

(ii) include an alternative proposal for the applicable project that describes each
modification sought by the participant with respect to the project.

(C) No Judicial Review.—A project for which arbitration is initiated under subparagraph (A) shall not be subject to judicial review.

(3) Compelled Arbitration.—

(A) Motion to Compel Arbitration.—

(i) In General.—If a participant seeks judicial review of a final decision with respect to a project, the Secretary may file in the applicable court a motion to compel arbitration in accordance with this Act.

(ii) Fees and Costs.—For any motion described in clause (i) for which the Secretary is the prevailing party, the applicable court shall award to the Secretary—

(I) court costs; and

(II) attorney’s fees.

(B) Arbitration Compelled by Court.—If a participant seeks judicial review of a project, the applicable court shall compel arbitration in accordance with this Act.
(g) **Selection of Arbitrator.**—For each arbitration commenced under this Act—

(1) the Secretary shall propose 3 arbitrators from the list published under subsection (e)(1); and

(2) the applicable participant shall select 1 arbitrator from the list of arbitrators proposed under paragraph (1).

(h) **Responsibilities of Arbitrator.**—

(1) **In General.**—An arbitrator selected under subsection (e)—

   (A) shall address all claims of 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) **Selection of Proposals.**—An arbitrator shall make a decision with respect to each applicable request for initiation of arbitration under this Act by—

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

   (B) selecting an alternative proposal submitted by the applicable participant; or
(C) rejecting both projects described in subparagraphs (A) and (B).

(3) LIMITATIONS.—

(A) ADMINISTRATIVE RECORD.—The evidence before an arbitrator under this subsection shall be limited solely to the administrative record for the project.

(B) NO MODIFICATIONS TO PROPOSALS.—An arbitrator may not modify any proposal contained in a request for initiation of arbitration of a participant under this Act.

(i) 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 (e)(1)(A).

(j) 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 ac-
cordance with law, within the meaning of section 706(2)(A) of title 5, United States Code.

(k) Deadline for Completion of Arbitration.—Not later than 90 days after the date on which a request to initiate arbitration is filed under subsection (f)(2), the arbitrator shall make a decision with respect to the request to initiate arbitration.

(l) 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.

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

(n) REPORTS.—

(1) IN GENERAL.—Not later than 1 year after the date on which the pilot program is established, and annually thereafter, 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 Region 1 of the Forest Service, a report of not longer than 10 pages describing the implementation of the pilot program for the applicable year, 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) INITIAL REVIEW.—Not later than 2
years after the date on which the pilot program
is established, the Comptroller General of the
United States shall review the implementation
by the Secretary of the pilot program.

(B) REVIEW ON TERMINATION.—On termi-
nation of the pilot program under subsection
(o), the Comptroller General of the United
States shall review the implementation by the
Secretary of the pilot program.

(C) REPORT.—On completion of the review
described in subparagraph (A) or (B), the
Comptroller General of the United States shall
submit to the Committee on Agriculture, Nutri-
tion, and Forestry and the Committee on En-
ergy 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.

(o) TERMINATION.—The pilot program shall termi-
nate on the date that is 5 years after the date.
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).

(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 improve-
ments to the process;

(C) a description of the outcome of each ar-
bitration; and

(D) a summary of the impacts of each out-
come 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 termi-
nation 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 pro-
gram;

(ii) the location and types of projects
that were arbitrated under the pilot pro-
gram;
(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 ar-
bitrators who participated in the pilot pro-
gram;

(vi) the type and outcome of any re-
quests for judicial review with respect to a
project that the Secretary designated for ar-
bitration under the pilot program; and

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

(B) REPORT.—After completion of the re-
view 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 For-
ery and the Committee on Energy and Natural
Resources of the Senate and the Committee on
Natural Resources of the House of Representa-
tives 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.
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.

DECEMBER 5, 2018

Reported with an amendment

S. 2160

115th CONGRESS
2d SESSION