

Alliance for Justice * American Association For Justice * Center for Justice & Democracy
Consumer Action * Earthjustice * Impact Fund * National Employment Lawyers Association
Progressive Congress Action Fund * Public Citizen * Public Justice

May 14, 2018

Chairman Pat Roberts
Senate Ag., Nutrition & Forestry Committee
328A Russell Senate Office Building
Washington, D.C. 20510

Ranking Member Debbie Stabenow
Senate Ag., Nutrition & Forestry Committee
328A Russell Senate Office Building
Washington, D.C. 20510

RE: Please Oppose Forced Binding Arbitration Clauses in Farm Bill

Dear Chairman Roberts and Ranking Member Stabenow:

The undersigned organizations write to express our strong opposition to the inclusion of any language in the draft 2018 Farm Bill legislation which would give the Forest Service forced “binding arbitration” power for challenges to certain final agency actions. Forced binding arbitration eliminates judicial review, thereby eliminating the public’s access to the courts. Such a practice simply has no place in the American justice system.

Unfortunately, several pieces of legislation filed this Congress callously use the urgent threat of wildfires as an excuse to eviscerate access to justice through the courts through forced binding arbitration clauses and related provisions, rather than seriously seeking to help the communities most affected by these fires. The Senate Agriculture, Nutrition and Forestry Committee should resist efforts to include language from these bills or similar provisions in the draft farm bill.

Forced binding arbitration between two private entities is an insidious tool often used by wealthy corporations to shield actions from public view – and, as important – from independent oversight by our court system. It is inappropriately used by these powerful entities to marginalize claims of consumer fraud, workplace discrimination and even nursing home abuse of the elderly. Giving a federal agency like the Forest Service the power to use an internal, forced binding arbitration process to produce a “final agency action,” and then eliminating any judicial review of that outcome, would be equally inappropriate.

Moreover, bestowing the Forest Service with this power would be unprecedented under administrative law, allowing this one agency to shield its actions from any judicial oversight, even if those actions clearly violate the law. The right of the public to seek justice through the courts is a critical protection under the law and under our Constitution. Eliminating this right for one set of final agency actions, by one particular agency, should be opposed as a poison pill to any attempt at bipartisan farm legislation. It is worth noting that current federal law allows for agencies to submit some disputes to arbitration (see the Administrative Dispute Resolution Act of 1996), but in all cases “arbitration shall be subject to judicial review” (5 U.S.C. § 581). Forced binding arbitration is a radical departure from current law because it eliminates this requirement for judicial review. Even couching this power as a “pilot program” which would be limited to certain geographic regions, a set number of projects, or specific final agency actions, does not

change the fact that this is a dangerous, unprecedented departure from the constitutional balance of power. It would be irresponsible to give any agency the power to shield its actions from oversight, no matter how “limited” this power may be prescribed in geography or total number of final agency actions.

The Committee should also reject binding arbitration language in the farm bill because it effectively eliminates the due process and public notice and comment protections of the Administrative Procedure Act (“APA”), since there is no requirement, in any of the language we’ve seen to date that the arbitrator must select an action written and reviewed by the Forest Service. In fact, it creates the possibility of a final plan wholly written by industry or other private parties. Nor have we seen any language that would require public notice and comment of the final decision of the arbitrator. This directly erodes the power, protection and purpose of the APA.

We urge you and the entire committee to resist any effort to include language creating a forced binding arbitration process for challenges to Forest Service final actions. Forced binding arbitration denies access to the courts while simultaneously eliminating the checks and balances our founders envisioned for an independent judiciary. On behalf of our members and supporters, we oppose inclusion of such language in the farm bill and ask that you defend judicial review, access to justice and the rule of law.

Sincerely,

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