Alliance for Justice * Allied Progress * American Association for Justice * American Bird Conservancy * Center for Biological Diversity * Center for Justice & Democracy * Clean Water Action * Conservation Lands Foundation * Consumer Action * Daily Kos * Defenders of Wildlife * Earthjustice * Endangered Species Coalition * Environmental Law & Policy Center * Foundation Earth * Friends of the Earth * Hip Hop Caucus * Hurt Stolz, P.C. * Idaho Conservation League * League of Conservation Voters * Make the Road New York * National Association of Consumer Advocates * National Consumer Law Center * Public Citizen * Public Knowledge * Sierra Club * Take Back Your Rights PAC * Texas Watch * The Impact Fund * The Wilderness Society * Waterkeeper Alliance * White River Waterkeeper * Woodstock Institute * Workplace Fairness

October 31, 2017

RE: <u>Please Defend Citizen Enforcement and the Rule of Law – Oppose H.R. 2936 -- the so-called "Resilient Federal Forest Act of 2017"</u>

Dear Representative:

For decades, Congress has recognized the critical role the public plays in enforcing our most fundamental federal laws. Under many statutes—including those protecting civil rights, consumers, the environment, government transparency, people with disabilities, private property, public health, and workers—Congress has authorized the filing of enforcement actions by Americans of all political persuasions seeking justice under the law. Access to justice through access to the federal courts is a fundamental principle in our American democracy. Unfortunately, Representative Westerman's bill, H.R. 2936, the poorly named "Resilient Federal Forest Act of 2017," not only fails to improve the quality of public forests by promoting potentially harmful and destructive logging projects, but tramples on access to justice principles by stifling citizens' ability to seek redress through our courts. Taken together, the provisions of this legislation would severely compromise the "overriding objective of the Forest Service's forest management program [which] is to ensure that the National Forests are managed in an ecologically sustainable manner."[1] We therefore urge you to oppose H.R. 2936.

Specifically, Title III, Section 311 of the bill forces many management challenges through an internal and "binding" agency arbitration process that completely eliminates the possibility of judicial review in federal courts. This section of the bill completely usurps the Constitution's Article III power given to the courts and vests it instead with the executive branch, completely shielding the agency from the checks and balances of an independent judiciary. In short, this proposal will allow the Department of Agriculture to be both prosecutor and final judge. While agencies frequently conduct quasi-judicial proceedings, all of those decisions are ultimately "final agency actions" appealable to federal courts and judicial oversight as the Constitution intended. Instead, H.R. 2936 improperly cuts Article III courts completely out.

The agency-run arbitration process also creates a likely violation of the nondelegation doctrine - a doctrine which prohibits the exercise of constitutional authority given to any branch of government by another branch or a non-government private party. The bill creates this constitutional problem by requiring that any party objecting to the agency's management proposal -- and shunted unwillingly into this "arbitration" process -- write their own proposal. The arbitrator could then select the privately written proposal as the final plan to "to be conducted" and carried out by the agency. This delegation is simply unconstitutional. Laws are passed by Congress and implemented by agencies. Neither private individuals nor the courts (including an arbitrator) should be writing the regulations. This is squarely the job of the agency empowered by the law. Thus the proper redress to a legally deficient plan is to have the agency staff try again, not give that power to private individuals. This whole process also effectively

[1] https://www.fs.fed.us/forestmanagement/aboutus/index.shtml (web site visited October 27, 2017)

obliterate the due process and public notice and comment protections of the Administrative Procedure Act, since there is no requirement that a privately selected plan get *any* public review . Such review is critical, especially given that – shockingly - the final plan selected by the arbitrator must only "*consider*… whether the proposal is consistent with" the law, rather than ensuring it actually does so.

Moreover, the bill's language implies it creates only a "discretionary" arbitration pilot program limited to "no more than 10" legal challenges a year, which is incredibly misleading. The public, in fact, has no discretion on whether to have their concerns heard by a federal court or submit to binding arbitration. The agency would have "sole discretion" to decide which challenges are forced into this binding arbitration process, and that decision would not be judicially reviewable. Moreover, the agency could circumvent judicial review for up to ten challenges a year in each of the nine Forest Service Regions and each of the fourteen state regions of the Bureau of Land Management. This broad one-sided discretion would imbue the agency with the power to shield itself from whichever legal challenges it finds most problematic.

The public's legal right to challenge government action (or inaction) in federal court is essential as a "check and balance" to the failure of the executive branch to enforce the law as Congress intended. As the Supreme Court has emphasized, a citizen who brings an enforcement action "does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority" (*Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)). Shielding agency actions from review by independent federal courts, as section 311 of this bill allows, violates this access to justice principle and is simply undemocratic.

Further weakening access to justice principles, Title III, Section 301 of the bill essentially eliminates the ability for most of the public to participate at all by eliminating the possibility of recovering legal fees under both the Equal Access to Justice Act and the Claims and Judgment Fund of the U.S. Treasury. It is often not enough to simply allow a case to be brought in federal court. In order to ensure citizens have the resources required to fulfill the role of vindicating an important public policy (in this case, the sustainable management of our public lands) Congress has long allowed those who file successful suits to recover their litigation costs—including "reasonable" attorneys' fees, based on prevailing market rates.[2] The importance of these fee-recovery provisions lies beyond dispute. If a citizen "'does not have the resources'" to pursue an enforcement action, "'his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers'" (*City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (quoting 122 Cong. Rec. 33,313 (1976)). Section 301 of this bill only further tips the scales of justice in favor of deep-pocketed corporations and against the public's ability to enforce the intent of Congress and the rule of law.

Finally, Title II, Section 203 and Title III, Section 302 of the bill hollow out the ability to win justice through the courts by restricting the ability of courts to issue injunctions and restraining orders to enjoin agency actions that may do irreparable harm (assuming a challenge is actually *allowed* to get to federal court). Title II, Section 203 specifically eliminates any possibility of stopping certain management actions, including salvage operations, pending court review. This provision overrides a long-standing judicial rule -- Rule 65 of the Federal Rules of Civil Procedures -- and eliminates the ability of federal judges to apply an appropriate balancing test and independently determine if an injunction is warranted. In this instance, justice delayed equals justice denied since irreparable damage may be done to a forest ecosystem before a court can properly review the action and issue a final ruling. In addition, Section 302

[2] *See, e.g.*, 5 U.S.C. § 552(a)(4)(E)(i) (freedom of information); 15 U.S.C. § 2060(c) (consumer-product safety); 29 U.S.C. § 794a(b) (disability rights); 29 U.S.C. § 2617(a)(3) (workers' rights); 42 U.S.C. § 1988(b) (civil rights); 42 U.S.C. § 5207(c)(3) (gun rights); 42 U.S.C. § 7604(d) (clean air).

of Title III imposes unnecessary additional balancing tests that would interfere with a court's review under Rule 65 – again, assuming a challenge can even still be brought in federal court.

In sum, H.R. 2936 is a dangerous and reckless attack on every day citizens' ability to enforce the law. On behalf of our millions of members and supporters, we ask that you defend the principle of citizen enforcement and the rule of law **by opposing H.R. 2936 when it comes to the House floor.**

Sincerely,

Alliance for Justice
Allied Progress
American Association for Justice
American Bird Conservancy
Center for Biological Diversity
Center for Justice & Democracy
Clean Water Action
Conservation Lands Foundation
Consumer Action
Daily Kos
Defenders of Wildlife
Earthjustice
Endangered Species Coalition
Environmental Law & Policy Center
Foundation Earth
Friends of the Earth
Hip Hop Caucus
Hurt Stolz, P.C.
Idaho Conservation League
League of Conservation Voters
Make the Road New York
National Association of Consumer Advocates
National Consumer Law Center
Public Citizen
Public Knowledge
Sierra Club
Take Back Your Rights PAC
Texas Watch
The Impact Fund
The Wilderness Society
Waterkeeper Alliance
White River Waterkeeper
Woodstock Institute
Workplace Fairness