

**Testimony of Professor John C. Ruple,  
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Before the U.S. House of Representatives, Committee on Natural Resources,  
Subcommittee on Energy and Mineral Resources  
September 6, 2017  
Hearing on H.R. 3565**

Chairman Gosar, Ranking Member Lowenthal, and members of the Subcommittee. Thank you for the opportunity to submit written testimony for this hearing on H.R. 3565, the “Federal Land Freedom Act.” I am an Associate Professor of Law for Research at the University of Utah S.J. Quinney College of Law and Fellow with the Wallace Stegner Center for Land Resources and the Environment. I am also a Faculty Affiliate with the University of Utah’s Institute for Clean and Secure Energy, and the University’s Global Change and Sustainability Center. I began my professional career as a third-party NEPA contractor, preparing NEPA documents for privately funded activities on National Forest System lands throughout the Western U.S. My experience as a NEPA analyst and project manager inspired me to attend law school. I now work primarily on issues involving federal public land management and the resources those lands contain. I have over eighteen years of professional experience working on public land management and have published widely on related issues. What follows are six significant concerns regarding H.R. 3565.

**I. Federal Data Does Not Support a Need to Reduce Environmental Safeguards or Expedite Oil and Gas Production from Federal Lands**

H.R. 3565 is premised on the assumption that federal agencies are stifling oil and gas development on federal lands. Professor Mark Squillace from the University of Colorado addressed this issue in his June 29, 2017 testimony before this Subcommittee,<sup>1</sup> so I will not duplicate his comments here. I do, however, want to reiterate that while the number of oil and gas leases, acres leased, and the total number of new leases issued have all declined in recent years across both federal and state lands, the number of producing leases on federal land is at an all-time high.<sup>2</sup> Federal onshore oil production increased every year between FY 2006 and 2015 and by more than 70-percent over that period.<sup>3</sup> The amount of federal land acreage producing oil and gas is also at near-record levels, having risen for seven consecutive years.<sup>4</sup> However, during Fiscal Year 2015 just 15.6-percent of the federal acreage that was offered for lease received bids.<sup>5</sup> At the close of the fiscal year, 6,194 approved applications

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<sup>1</sup> Federal Land Oil/Gas Development, Subcomm. on Energy and Mineral Res. of H. Comm. on Nat. Res., 115th Cong. (2017) (testimony of Prof. Mark Squillace). I would also like to thank my Research Assistant, Merrill Williams, for his assistance in preparing this section.

<sup>2</sup> Bureau of Land Mgmt., Dept. of the Interior, Oil and Gas Statistics, Table 5 — Number of Producing Leases, [www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics](http://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics) (last visited Sept. 1, 2017).

<sup>3</sup> Mark Humphreys, Cong. Res. Serv., R42432, U.S. Crude Oil and Natural Gas Production in Federal and Nonfederal Areas 3 (2016).

<sup>4</sup> Oil and Gas Statistics, *supra* note 2 at Table 6.

<sup>5</sup> *Id.* at Table 15.

for permits to drill remained undeveloped on federal land,<sup>6</sup> and according to the Congressional Research Service, for 2015, just 39.8-percent of leased federal acres were in production.<sup>7</sup> As the Congressional Research Service also noted, “high global supply and a softening of demand” contribute to low oil and gas prices; and prices are not projected to rebound in the foreseeable future. “This lower price, if sustained, may impact long term oil demand and lower production volumes.”<sup>8</sup>

I therefore concur with Professor Squillace’s assessment that “[r]amping up the issuance of drilling permit[s] during a time when so many approved permits are not being used would thus seem to be irresponsible.”<sup>9</sup>

## **II. H.R. 3565 Does Not Adequately Protect the Public Interest or Ensure Consistency with Existing Management Requirements**

H.R. 3565 would allow states with regulatory oil and gas programs to take over leasing, permitting and regulation of oil and gas exploration, production, and permitting on federal land within their state. But aside from requiring that the federal treasury not experience a decrease in royalty payments, and requiring assurances of state capacity to carry out the provisions of the act, H.R. 3565 does nothing to ensure that state programs meet the many and diverse interests associated with oil and gas development.

First, the Secretaries of Agriculture and Interior can withhold approval of a state program only if the state lacks capacity to carry out the requirements of the act, or where “a State regulatory program would result in decreased royalty payments to the Federal Government.” H.R. 3565 therefore appears to allow states to increase royalty rates above the 12.5-percent currently provided by federal law<sup>10</sup> and retain all of the benefits of this increase, as a royalty rate increase could be accomplished without changing the 6.25-percent share that is currently returned to the federal government for lands outside of Alaska. This would upset the equitable balance between the federal and state governments and deprive the American taxpayer of their fair share of the revenue derived from federal lands.

An increase in royalty rates does not appear unreasonable given that, as the Government Accountability Office recently noted, oil and gas royalty rates in the Intermountain West range as high as 20-percent, and three of the six states evaluated set their minimum royalty rate at 16.67-percent or higher.<sup>11</sup> Indeed, should H.R. 3565 be enacted into law, states may feel compelled to raise royalty rates on federal land so as not to disadvantage their own state trust lands administrators who already charge higher royalty rates.

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<sup>6</sup> *Id.* at Table 12.

<sup>7</sup> U.S. Crude Oil and Natural Gas Production in Federal and Nonfederal Areas, *supra* note 3 at 7.

<sup>8</sup> *Id.* at 1.

<sup>9</sup> Mark Squillace testimony, *supra* note 1.

<sup>10</sup> 43 C.F.R. § 3103.3-1.

<sup>11</sup> U.S. Gov’t Accountability Off., GAO-17-540, Oil, Gas, and Coal Royalties: Raising Federal Rates Could Decrease Production on Federal Lands but Increase Federal Revenue 9 (2017).

Second, H.R. 3565 leaves the Secretaries of Agriculture and Interior with no recourse if they find that state oil and gas programs fail to adequately protect the lands and resources under BLM or Forest Service care, as inadequate resource protection and management are not grounds for rejecting or rescinding a state regulatory program. This creates an untenable conflict with the BLM and Forest Service’s mandate to balance competing resources uses. Indeed, the Federal Land Policy and Management Act (FLPMA) requires the Secretary to “take any action necessary to prevent unnecessary or undue degradation of the lands.”<sup>12</sup> Similarly, the Multiple Use Sustained Yield Act directs that Forest Service management must consider “the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.”<sup>13</sup> These mandates would be difficult if not impossible to fulfill absent the power to regulate energy permitting, exploration, and production on BLM and National Forest System lands. In short, the benefits to states and the oil and gas industry come at the expense of the American taxpayer and our public lands.

### **III. Exempting State Leasing, Permitting, and Regulation from NEPA is Bad for the Land and Bad for the Public that Owns it**

My NEPA comments focus on four areas: (1) the overwhelming number of projects that do not require preparation of an EIS, (2) NEPA reduces environmental impacts by statistically significant amounts without a comparable adverse impact on job growth or energy development, (3) NEPA provides an important mechanism for public input, and (4) claims regarding NEPA litigation are dramatically overstated.

The National Environmental Policy Act (NEPA)<sup>14</sup> requires that federal agencies identify and consider the impacts of their actions and alternative means of attaining the objectives of those actions before undertaking any “major Federal action significantly impacting the quality of the human environment.”<sup>15</sup> NEPA does not require that federal agencies choose the least environmentally damaging alternative, but only that public input be considered before decisions are made, and that agencies take a hard look at the environmental consequences of their actions before rendering a decision.<sup>16</sup>

The scope and intensity of impacts associated with the proposed action determine the level of analysis required under NEPA. Where impacts are “significant,” an Environmental Impact Statement (EIS) is required. Where the significance of impact is uncertain, the federal agency may prepare an EIS or opt to prepare a less demanding Environmental Assessment (EA).<sup>17</sup> If, after completing an EA, the lead agency concludes that the impacts are significant, the agency then proceeds to prepare an EIS. If, through an EA, the lead agency finds that the impacts are not significant, the agency issues a finding of no significant impact and a final decision. Agencies are also authorized to promulgate regulations identifying categories of action that “do not individually or cumulatively have a

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<sup>12</sup> 43 U.S.C. § 1732(b).

<sup>13</sup> 16 U.S.C. § 531(a).

<sup>14</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370(h).

<sup>15</sup> 42 U.S.C. § 4332(2)(C).

<sup>16</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

<sup>17</sup> 40 C.F.R. § 1508.9.

significant effect on the human environment” and categorically exclude these actions from further NEPA review.<sup>18</sup>

The vast majority of NEPA decisions involve Categorical Exclusions (CEs) and EAs. According to the Government Accountability Office, CEs account for roughly 95-percent of all NEPA analyses, less than 5-percent of NEPA analysis involves an EA, and less than 1-percent of projects necessitate EISs.<sup>19</sup> With over 99-percent of actions receiving expedited review, criticisms directed towards EISs significantly overstate NEPA’s actual regulatory burden. NEPA’s critics also tend to focus on the time and expense involved in EIS preparation without considering either the compelling need for EIS preparation or the reduction in environmental impacts that occurs through the NEPA process.

By way of example, the Greater Natural Buttes project in my home state of Utah was approved in 2012 after completion of an EIS. It is hard for me to imagine not making a searching review of a project such as this before granting an approval. As approved, the Greater Natural Buttes project encompassed a 162,911-acre project area, authorized 3,675 new wellbores, 12.7 square-miles of total new surface disturbance, 594 miles of new access roads, 594 miles of gas gathering pipeline, 483 miles of water gathering pipeline, 35 miles of buried gas transport pipeline, 2 man camps, 2 compressor stations, 2 water tank batteries, 15 water injection facilities, 7 miles of overhead electric power lines, use of 7,571 acre-feet of fresh water for well drilling, and annual disposal of 1,385 acre-feet of product water.<sup>20</sup> The EIS process ensured that the public had an opportunity to provide input on the tradeoffs this project involved before the BLM made an irretrievable commitment of public resources. Approval of projects like Greater Natural Buttes that involve significant environmental impacts and commit expansive public resources to private use for multiple generations should not, in my opinion, be exempted from NEPA’s hard look requirement.

Such a hard look is appropriate because where EISs are required, they have proven to be effective in reducing environmental impacts. Mark Capone and I recently published a series of articles empirically demonstrating that, though much maligned, EISs are effective in reducing environmental impacts, and that these reductions generally do not impose fiscal or economic hardships. Mr. Capone and I reviewed every EIS for full field oil and gas developments on BLM land within Colorado, Montana, Utah, and Wyoming between January 2004 and October 2014.<sup>21</sup> There were only thirteen EISs meeting these selection criteria, providing a clear indication of how rare EISs actually are.

Our analysis found that NEPA compliance leads to final decisions that are significantly less impactful on the environment when compared to initial project proposals.<sup>22</sup>

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<sup>18</sup> 40 C.F.R. § 1508.4.

<sup>19</sup> U.S. Government Accountability Office, GAO-14-370, National Environmental Policy Act, Little Information Exists on NEPA Analyses 8 (2014).

<sup>20</sup> Bureau of Land Mgmt., Dept. of the Interior, Greater Natural Buttes Record of Decision (2012).

<sup>21</sup> John Ruple & Mark Capone, *NEPA—Substantive Effectiveness Under a Procedural Mandate: Assessment of Oil and Gas EISs in the Mountain West*, 7 G. WASH. J. ENERGY & ENVTL L. 39 (2016).

<sup>22</sup> *Id.* Statistically significant impact reductions were, for example, found for permeant surface disturbance, temporary surface disturbance, and nitrogen oxide emissions. *Id.* at 44.

While reductions may be partially attributable to legal requirements external to NEPA (such as Clean Air Act, Clean Water Act, or Endangered Species Act requirements, or intervening economic and technological factors), external factors alone did not adequately explain impact reductions. We also found that the number of alternatives considered within an EIS affects both the magnitude and proportion of impact reduction, with EISs considering a broader range of alternatives being more effective at reducing environmental impacts.<sup>23</sup>

Mr. Capone and I then reviewed every EIS for a BLM Resource Management Plan revision completed across the same four-state geographic area and over the same decade-long time span.<sup>24</sup> Again, the paucity of EISs speaks to how few EISs are actually prepared — there were just sixteen EISs across the four-state region in ten years.

Our analysis found that management plan revisions increased application of more protective oil and gas surface use stipulations by statistically significant amounts without causing a statistically significant change in either the number of jobs created or the number of oil and gas wells drilled. In fact, both the number of jobs created and wells drilled increased slightly despite strengthened environmental protections.

NEPA, in sum, is not the Boogey Man that some portray it to be. Less than one percent of projects requires an EIS, and projects that do require this most searching level of analysis generally see statistically significant reduced impacts without significantly impeding economic development. Eliminating NEPA review, as H.R. 3565 proposes to do, would therefore remove an important tool in reducing impacts to public lands and resources that belong to us all, and which can be accomplished without the economic cost many assume.

This brings me to my next to last point regarding NEPA: BLM- and Forest Service-managed lands are public lands, and the public benefits from opportunities to engage in oil and gas project planning and development decisions involving their lands. EISs are part of an iterative analytical and decision-making process under which the public has multiple opportunities to engage in issue identification, development of alternatives, impact analysis, and weighing the inevitable tradeoffs that will occur. H.R. 3565's exemption from NEPA deprives American citizens of important opportunities to provide input on the management of, what is after all, their lands.

Finally, while most NEPA decisions do not result in litigation, federal agencies prevail in the vast majority of cases that do go to court. The Government Accountability Office (GAO) reports that, over the five-year period from 2008 through 2012, there were, on average 473 EISs annually.<sup>25</sup> Since, as the GAO notes, EISs represent less than one-percent of all NEPA decisions,<sup>26</sup> this indicates that over 47,300 NEPA decisions are completed every year. The GAO also reports that there are, on average, less than 100 NEPA cases brought every year.<sup>27</sup> This means that just 1 in 500 or 0.2 percent of NEPA

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<sup>23</sup> *Id.*

<sup>24</sup> John Ruple & Mark Capone, *NEPA, FLPMA, and Impact Reduction: An Empirical Assessment of BLM Resource Management Planning and NEPA in the Mountain West*, 46 ENVTL. L. 953 (2017).

<sup>25</sup> National Environmental Policy Act, Little Information Exists on NEPA Analyses, *supra* note 19 at 8.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 20.

decisions result in litigation. To contend that NEPA litigation runs rampant simply is not supported by the evidence. Furthermore, as the GAO notes, the federal government prevails in the majority of NEPA cases.<sup>28</sup> Again, the data simply does not support the contention that NEPA is constraining oil and gas development on federal land.

#### **IV. The burden of ESA Compliance Does Not Justify the Potential Extirpation of Protected Species, and H.R. 3565's Exemption for the Oil and Gas Industry Comes at the Expense of Other Federal, State, and Private Land Users**

The burden of Endangered Species Act (ESA) compliance simply does not justify doing away with protections designed to prevent the extirpation of protected species. Furthermore, oil and gas operators will remain subject to the Act's prohibitions and penalty provisions, and mechanisms for immunizing operators from liability will become far more onerous.

As a threshold matter, by disincentivizing protection of threatened and endangered species on federal land, H.R. 3565 will force the U.S. Fish and Wildlife Service to take a harder line on protecting those species when and where the Service can, in order to meet its mandate of avoiding species extirpation. Private property owners, state trust lands administrators and beneficiaries, the timber industry, mineral developers, solar and wind power generators, electrical transmission line operators, livestock grazers, ski area operators, and a host of other constituents — including oil and gas operators working on non-federal land — will bear a heightened share of the burden for preventing species extinction, since they all fall outside of H.R. 3565's ESA exemption. Similarly, the Fish and Wildlife Service will inevitably consider its reduced influence over oil and gas development decisions when deciding whether species delisting is appropriate, leaving species under federal control even longer.

Additionally, when currently faced with a listing petition, the Fish and Wildlife Service can conclude that ESA listing is not necessary because state laws provide adequate and enforceable protections for that species. Such decisions appear less likely if state oil and gas leasing, permitting, and development are exempted from the ESA, as H.R. 3565 proposes. While some on this Subcommittee likely take issue with the protections afforded the greater sage-grouse, it is worth considering how much more onerous those protections may have been had the Service been forced to list the bird. H.R. 3565's gift to the oil and gas industry on federal lands is likely to come at the expense of a host of other public and private land owners, users, and developers.

A closer look at the ESA indicates that implementing H.R. 3565 may not produce the intended outcome. By way of background, Congress enacted the ESA to “provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved,” and “to provide a program for the conservation of such endangered species and threatened species.”<sup>29</sup> Section 9 of the ESA prohibits the “take” of listed animals,

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<sup>28</sup> *Id.* at 21.

<sup>29</sup> 16 U.S.C. § 1531(b).

except when the take is authorized in a federal permit.<sup>30</sup> “Take” includes “harm,” which is any act that kills or injures wildlife, including habitat modifications that significantly impair feeding, sheltering, or breeding.<sup>31</sup> An unauthorized take is punishable by imprisonment for up to one year, fines of up to \$50,000 per violation, or both.<sup>32</sup> One avoids ESA liability by complying with the Act’s procedural requirements.

Section 7 of the ESA requires that federal agencies consult with the Fish and Wildlife Service regarding actions “authorized, funded, or carried out” by them. Consultation insures that those actions are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat.”<sup>33</sup> Consultation can be informal or formal.<sup>34</sup> On average, informal consultation is completed in just thirteen days.<sup>35</sup> Formal consultation is comparatively rare, with informal consultations outnumbering formal consultations by an almost twelve to one margin between 2008 and 2015.<sup>36</sup>

However, if the activity is likely to adversely affect a listed species or its critical habitat and formal consultation is required, then the agency must submit a biological assessment to the Service.<sup>37</sup> This assessment “evaluate[s] the potential effects of the action” on listed species and that species’ critical habitat.<sup>38</sup> After reviewing the assessment, the Service prepares and issues a biological opinion addressing whether the proposed action is likely to jeopardize any listed species, and if so, whether “reasonable and prudent alternatives” exist to avoid jeopardy.<sup>39</sup>

If the biological opinion concludes that jeopardy is unlikely and that there will not be an adverse modification of critical habitat, the Service issues an incidental take statement (ITS).<sup>40</sup> ITS compliance shields its holder and their agents from liability for the inadvertent taking of an ESA-listed species.<sup>41</sup> A jeopardy opinion, on the other hand, leaves operators exposed to liability for the take of a listed species — but jeopardy opinions are exceedingly rare. A recent paper in the PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES found

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<sup>30</sup> 16 U.S.C. § 1538(a)(1)(B). Section nine of the ESA provides lesser protections for listed plants. *Id.* at §1538(a)(2).

<sup>31</sup> 50 C.F.R. § 222.102.

<sup>32</sup> *See* 16 U.S.C. §§ 1540(b) (criminal penalties), and 1540(a) (civil penalties).

<sup>33</sup> 15 U.S.C. § 1536(a)(2).

<sup>34</sup> 50 C.F.R. §§ 402.13–402.14.

<sup>35</sup> Jacob W. Malcom and Ya-Wei Li, *Data Contradicts Common Perceptions About a Controversial Provision of the U.S. Endangered Species Act*, PROCEEDINGS OF THE NAT’L ACADEMY OF SCIENCES EARLY EDITION 2 (2015).

<sup>36</sup> *Id.*

<sup>37</sup> 50 C.F.R. § 402.14(c).

<sup>38</sup> 50 C.F.R. § 402.12(a).

<sup>39</sup> 16 U.S.C. § 1536(b)(3)(A).

<sup>40</sup> 16 U.S.C. § 1536(b)(4). Incidental take is a take that results from, but is not for the purpose of, carrying out an otherwise lawful activity. 50 C.F.R. § 402.02.

<sup>41</sup> 16 U.S.C. § 1536(b)(4)(C)(iv).

that of the 6,289 formal consultations completed by the Fish and Wildlife Service from January 2008 through April 2015, only 2 consultations resulted in jeopardy opinions.<sup>42</sup>

The time required to complete the process does not appear to be unreasonably onerous either. The Service must deliver a biological opinion within 45 days of completing the consultation.<sup>43</sup> The GAO found that the Service completes the consultation process on time 75-percent of the time.<sup>44</sup> Recent studies estimate median time to complete the process at 62 days.<sup>45</sup> Such delays are a small price to pay to prevent species extinction.

Critically, actions lacking a federal nexus are still subject to the prohibition against harming a listed species. Therefore, while H.R. 3565 would exempt states from ESA compliance, it would not shield oil and gas operators from liability, and the path to liability protection for an inadvertent “take” is far more onerous for non-federal entities. Under section ten of the ESA, an incidental take permit (ITP) is available to parties undertaking otherwise lawful projects that lack a federal nexus and that might result in the unintended take of a listed species. To apply for an ITP, the proponent must prepare a Habitat Conservation Plan (HCP).<sup>46</sup> HCP permitting takes approximately three times longer to complete than consultation under section 7 of the Act, and HCP preparation can be quite expensive.<sup>47</sup>

The ESA, in sum, does not appear to be as onerous as some contend, especially in light of the irreparable cost of extinction that the Act seeks to forestall. Furthermore, oil and gas operators on federal land will remain subject to the Act’s prohibitions while facing a more burdensome process to immunize themselves from potentially significant liabilities. In addition, other land owners and users will face a disproportionate burden of preventing species extinction.

## **V. Exempting State Leasing, Permitting, and Regulation from the APA is Bad for the Land and Bad for the Public that Owns it**

H.R. 3565 undermines the public’s ability to engage on matters that affect them directly, and to ensure that their lands and resources are managed in accordance with federal law. The Administrative Procedures Act (APA) establishes a transparent public process for rulemaking and adjudication of rights, creating an opportunity for the public to engage in the development of administrative rules that impact them. By exempting oil and gas activity from the APA, H.R. 3565 makes the rulemaking process less transparent, and insulates the American people from the government that is supposed to represent them.

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<sup>42</sup> Malcom & Li, *supra* note 35 at 2.

<sup>43</sup> 50 C.F.R. § 402.14(e).

<sup>44</sup> U.S. Gov’t Accountability Off., *Endangered Species, More Federal Management Attention is Needed to Improve the Consultation Process*, GAO-04-93, 14 (2004).

<sup>45</sup> Malcom & Li, *supra* note 35 at 2.

<sup>46</sup> HCP requirements are set forth at 16 U.S.C. §§ 1539(a)(2)(A)(i)-(iv) and 1539(a)(2)(B)(i)-(v) (2012).

<sup>47</sup> Ruple et al., *Shooting the Albatross: Why a State Takeover of Federal Public Lands Would Make Endangered Species Act Compliance More Expensive and Difficult*, 39 ENVIRONS ENVTL. L. & POLICY J. 115, 136 (2016).

Furthermore, many federal laws do not include a private right of enforcement, relying instead on the APA to ensure compliance. By stating that “any action by a State to lease, permit, or regulate oil and gas exploration, development, and production in accordance with an approved State regulatory program shall not be subject to, or considered a Federal action, Federal permit, or Federal license under [the APA],” H.R. 3565 effectively places oil and gas leasing, exploration, and development on federal lands beyond the reach of federal courts. This removes a fundamental safeguard and means of protecting the public.

While federal laws can admittedly be burdensome to industry, those burdens protect resources and values that belong to every citizen, and to future generations of Americans. Indeed, statutes like the Clean Air Act, Clean Water Act, Safe Drinking Water Act, and a host of other laws regulating hazardous and toxic materials are specifically designed to protect human health and welfare. Statutory exemptions that have the potential to put human health at risk should not be taken lightly.

## **VI. H.R. 3565 Fails to Integrate Leasing, Permitting, and Regulation with BLM and Forest Service Planning, thusly Inviting Litigation and Potentially Slowing Energy Development**

H.R. 3565 fails to integrate BLM and Forest Service management planning and land use stipulations into the state leasing, permitting, and regulatory program, creating uncertainty for industry and inviting litigation. The BLM and the Forest Service conduct extensive land and resource planning prior to deciding whether federal public lands should be opened to oil and gas development. Where the agencies determine that leasing is appropriate, the agencies then identify management stipulations that will apply to the leased lands. This management planning process, and the stipulations that it produces, allow the agencies to fulfill their multiple-use, sustained-yield mandates. This mandate, as exemplified in the BLM’s organic act, the Federal Land Policy and Management Act (FLPMA), requires that:

[P]ublic lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.<sup>48</sup>

FLPMA further requires that “the public lands be managed in a manner which recognizes the Nation’s need for domestic sources of minerals, food, timber, and fiber from the public lands.”<sup>49</sup> The Forest Service operates under a similar mandate.<sup>50</sup> Management planning undertaken by both agencies endeavors to strike the delicate balance inherent in accommodating this wide range of uses. While reasonable people can disagree over how various uses should be balanced, the concept of balance is fundamental to modern public

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<sup>48</sup> 43 U.S.C. § 1701(a)(8).

<sup>49</sup> 43 U.S.C. § 1701(a)(12).

<sup>50</sup> 16 U.S.C. §§ 475 and 528.

land management. H.R. 3565, upends that balance by placing oil and gas development above all other public land uses.

H.R. 3565 authorizes states to lease, permit, and regulate oil and gas exploration, development, and production occurring on federal public lands without indicating the extent to which management stipulations contained in BLM and Forest Service management plans must be integrated into state leasing and development decisions. H.R. 3565 similarly fails to state whether a state may waive these stipulations during development and production permitting.

Uncertainty regarding the requirements that would attach to leases issued by a state also creates uncertainty for oil and gas operators. Uncertainty increases the likelihood of litigation, as both industry and the environmental community may view the desirability and enforceability of stipulations contained in management plans quite differently. Such litigation would occur outside of H.R. 3565's APA litigation shield. In its effort to minimize litigation and expedite oil and gas production, H.R. 3565 may, in fact, invite even more litigation.

## **Conclusion**

Reasonable people on both sides of the aisle and in lots of places in between desire to improve federal public land management and land use permitting. H.R. 3565, however, goes too far in expediting oil and gas development at the expense of balance, transparency, public engagement, and resource protection. H.R. 3565 puts a heavy and unnecessary thumb on the multiple-use, sustained-yield scale and deprives the American public of a say in management of its lands.

Careful, transparent, and publicly-engaged deliberations prior to making decisions that impact vast tracts of public land are hallmarks of the four acts from which states would be exempted under H.R. 3565.<sup>51</sup> If nothing else, the number and significance of the resources potentially at stake, the interrelated nature of complex resource considerations, and the difficulty involved in undoing errant decisions all counsel against passage of the Federal Land Freedom Act.

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<sup>51</sup> My testimony does not address the National Historic Preservation Act in detail because the concerns regarding public involvement made with respect to the other three exempted acts apply equally to the NHPA. Furthermore, Professor Hillary Hoffman addressed these issues in her November 15, 2016 testimony on an earlier version of the Federal Land Freedom Act, H.R. 866, 114th Cong. (2015).